

1 IN THE UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MISSOURI
3 WESTERN DIVISION

4 HALLMARK CARDS, INC.,)
5)
6 Plaintiff,))
7 vs.) Case No. 08-00840-CV-W-ODS
8)
9 MONITOR CLIPPER PARTNERS, LLC.,)
10 et al.) November 8, 2012
11) Kansas City, Missouri
12 Defendants.)

13 TRANSCRIPT OF JURY TRIAL PROCEEDINGS
14 BEFORE THE HONORABLE ORTRIE D. SMITH
15 UNITED STATES SENIOR DISTRICT JUDGE

16 VOLUME 4 OF 10

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27 produced by computer.

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1 NOVEMBER 8, 2012 - DAY 4

2 (The following proceedings were had OUT OF THE
3 PRESENCE AND HEARING OF THE JURY:)

4 THE COURT: Good morning. How can I help you?

5 MR. AISENBREY: Yes, Your Honor. We have one short
6 matter. In the O'Toole deposition which we will probably get
7 to tomorrow, there was objections to a number of things and a
8 number of them were sustained. But there's one short part that
9 we would like to ask you to reconsider. It has to do with an
10 Exhibit 516 which is the confidential agreement that is the
11 subject of the counterclaim. I have a copy of that for you if
12 you want to see it.

13 And the testimony that is at issue I have highlighted
14 here but, basically, it is Mr. O'Toole identifying the exhibits
15 that he sent to Mr. German and me as part of the compliance
16 with that agreement. Under the agreement Clipper was required
17 to send a redacted copy of the overview, investment overview
18 for attorneys eyes only to Mr. German and to me. This is the
19 transmittal letters doing that. And part of our defense to the
20 confidential agreement is, in fact, they redacted material they
21 were not suppose to redact and therefore they breached the
22 agreement. All I want to do here is put the letters into
23 evidence. That's the issue. I have a copy --

24 THE COURT: Let me see it.

25 MR. AISENBREY: This is the agreement and the

1 transcript pages I'm talking about highlighted.

2 THE COURT: Thank you.

3 Stacey?

4 MS. GILMAN: Your Honor, we believe, first of all,
5 the designations are coming too late. There was a protocol for
6 doing this. There may have been portions of depositions that
7 we would have asked to be added back in which have already been
8 played but it was our understanding the schedule was done for
9 that.

10 The objections to these portions to the extent they
11 were even designated before have all been sustained. And what
12 I hear him say now is these are really in the nature of
13 defenses to our counterclaim. You know, if we open the door to
14 that when we put on our case in chief, so be it. But at this
15 point in time there is no justification for putting them in
16 other than to try to make it appear there was some fraudulent
17 behavior and misrepresentation which Your Honor has already
18 said should not be proved by attorney communications of this
19 nature.

20 MR. AISENBREY: Briefly, Your Honor, these were
21 designated originally and they were part of a motion, a lot of
22 other things in the deposition.

23 With respect to the counterclaim, part of their
24 counterclaim is that they complied with the confidential
25 agreement. Part of the confidential agreement requires them to

1 send these materials to us. Just putting into evidence the
2 fact they sent them, our evidence will be that what they sent,
3 not fraudulently, just did not comply with the agreement and
4 the agreement requires that there would be no breaches of the
5 agreement. If there are, Hallmark can bring a lawsuit.

6 THE COURT: The orders in limine or orders with
7 respect to depositions have in my view always been sort of
8 interlocutory in nature, however, I don't see any reason at
9 this point to revisit this issue. If the defendants put on
10 evidence about the agreement, which they undoubtedly will, I
11 will be open to reconsider under rebuttal but it seems
12 inappropriate to put it in, in your case in chief.

13 MR. AISENBREY: That's fine, Your Honor. We were
14 just trying to anticipate and not have to worry about rebuttal.
15 We'll take it up later.

16 THE COURT: Okay.

17 MR. GERMAN: Your Honor, while we have your
18 attention, yesterday, our witness this morning is Dr. Serwin on
19 the damages case. Yesterday I gave Mr. Manchel a CD of 14, 15,
20 17 slides, demonstrative slides we intend to use. I'm told
21 there are some objections.

22 MR. MANCHEL: There are unfortunately 20 slides so
23 I'll try to go through them as quickly as I can. If it's okay
24 with Your Honor, I'll put them up on the screen.

25 Jeff, slide 2, please.

1 The issue with this, Your Honor, is five
2 presentations found in possession of Clipper and standing case
3 team. There is no delineation between the two. The evidence
4 in the case was there was one e-mail with Adam Doctoroff and
5 the other two or three e-mails at issue in this case were
6 solely with the standing case team. So we object to the
7 implication that they were in Clipper's possession. In fact,
8 Dr. Serwin's testimony will be he understands that one went
9 directly to Mr. Doctoroff, the others went to the standing case
10 team.

11 MR. GERMAN: That's true. That's why we said Clipper
12 and the standing case team. The testimony will be that the
13 three, the two OEC presentations and the Gold Crown, which are
14 part of Exhibit 487 went directly to Doctoroff and Kim and the
15 Exhibit 488 with the other two went to the standing case team.
16 That's what he intends to say.

17 MR. MANCHEL: Your Honor, I think it's just extremely
18 important to defendants that this be kept clear with the jury
19 and not confusing.

20 THE COURT: Well, you're parsing words very finely
21 here. If the slide said presentations in possession of,
22 instead of found in possession of, then I think it would be
23 unobjectionable because there's no question Mr. Doctoroff did
24 possess the slides, some of the information at one time and
25 there's no issue that the standing case team did. Do you agree

1 with that?

2 MR. MANCHEL: I do, Your Honor.

3 THE COURT: I think I'll leave you to point that out
4 in cross-examination, Mr. Manchel. That objection is
5 overruled.

6 MR. MANCHEL: Slide 3, please.

7 Your Honor, this goes to, there is a series of slides
8 that go to the issues that we have briefed for the Court in our
9 Serwin pretrial bench brief. These numbers were delivered in
10 discovery solely and exclusively based on the, what we call
11 colloquially the joint and several liability theory. There is
12 absolutely no admissible basis in the record, nor could there
13 be, for the use of these numbers. And so we object to them.
14 They are based on theories. We were given no alternate
15 theories, no alternate bases. So if these numbers are put in
16 front of the jury, the next question will have to be the basis
17 for them. The basis that's been offered has been ruled in
18 inadmissible by the Court and no other basis has ever been
19 offered to us in discovery.

20 The Court ordered specifically that no theories and
21 no argument may be pursued through the expert. And I don't
22 think the Court ruled specifically on the 30(b)(6) witness but
23 that would be the law governing the 30(b)(6) witness at trial
24 so we object to this being put in front of the jury.

25 THE COURT: I'm curious how you're going to do this,

1 Charlie.

2 MR. GERMAN: Well, this is the fourth time this issue
3 has been raised. In the motion for summary judgment they said
4 we couldn't use the numbers because there were no damages.
5 That was overruled on the grounds it was a question of fact for
6 the jury. In the Daubert motion, it was argued that the
7 methodology by which the numbers were derived was unreliable.
8 That was rejected. The Court held it was for the jury. And
9 the motions in limine, it was argued that the numbers violated
10 the Court's joint and several order. That was overruled and
11 held that it was a question of fact for the jury and not basis
12 for exclusion of the testimony.

13 So we had a preview of this the other day. The
14 report from Dr. Serwin, the original report, the updated report
15 with these numbers, never mentions joint and several. That's
16 not the basis on which he proceeded. During the course of the
17 deposition, he was cross-examined as he'll be cross-examined
18 here today that, well, of the unjust enrichment, did you
19 consider that Clipper might have gotten itself reimbursed from
20 RPG or from investors? And his answer would be no. I looked
21 at the appointed costs and the fees. The fees were paid
22 directly to Clipper. And that's my analysis. I have not
23 considered reimbursement. And he's free to cross-examine on
24 that.

25 With respect to the royalty, the testimony will be

1 that the royalty is a matter of economics and law, as you tell
2 them, is calculated at the time of the misappropriation in
3 September 1, 2005. The argument has been, well, that royalty
4 is probably going to be for the benefit of RPG and other
5 entities and therefore, Dr. Serwin, aren't you ascribing to
6 Clipper the royalties that would be paid by other parties?
7 And, of course, no, you cannot do that. Only a royalty that
8 would be paid by Clipper.

9 So what the report says and what Dr. Serwin will say
10 today is that at the time of the negotiation the only entity at
11 the table, the hypothetical table with Hallmark is Clipper.
12 September 1, 2005, there is no deal. RPG is off in the future
13 somewhere, still independently owned. There is no acquisition
14 entity. There is no equity commitment. There is no final debt
15 financing. There is no contractual relationship of any kind
16 between Clipper or its investors and RPG and its sellers or the
17 banks or the investors. But at the time of the hypothetical
18 negotiation, what would Clipper take into account in
19 negotiating a royalty with Hallmark? And as the Court has held
20 in limine order, pages 5 and 6, the testimony will be that
21 Clipper would consider the total economic benefits for the deal
22 it hopes to make but has not made at the time of the
23 negotiation. It would consider all of the benefits that it
24 believes are inherent in possession of the presentations trade
25 secrets.

1 THE COURT: I'm more concerned about the royalty
2 argument than I am about the unjust enrichment. It seems to me
3 that all of Hallmark's losses need to be attributable to either
4 Clipper or Doctoroff. And to the extent that that number
5 includes benefits to entities other than those two, it
6 shouldn't be, it will be not admitted and shouldn't be
7 reflected on the slide.

8 MR. GERMAN: Well, the unjust enrichment is comprised
9 of two components, the avoided costs and the fees. And the
10 avoided cost are costs that would have been incurred in the due
11 diligence process. Either to procure research or to hire
12 consultants to produce data or information equivalent to what
13 we see in the presentation trade secrets. During that due
14 diligence process, July and August and September, into
15 September, early September 2005, the entity doing the due
16 diligence is Clipper. It would be Clipper and only Clipper and
17 Mr. Doctoroff who would have had to, had they not had the trade
18 secrets, hire consultants or procure research to try to
19 replicate what they had in the presentation trade secrets.

20 So what the testimony will be is at that time during
21 the due diligence process the only entity out there, since RPG
22 is still independently owned and the investors are not
23 committed, there is no deal, the entity doing the due
24 diligence, thinking about still, considering whether to make a
25 final bid on the deal is Clipper. Clipper would incur those

1 costs.

2 Now, post deal they will argue Clipper would seek
3 reimbursement under its contracts, both with RPG and that
4 contract doesn't come into existence until November, or from
5 Fund II, the investment, which at the time of the due diligence
6 has not committed to the deal because there is no deal. They
7 haven't even submitted the final bid yet. It doesn't get
8 submitted until later in September.

9 So whether Clipper would be entitled to reimbursement
10 of those costs is, I think, a question of fact. They rely on
11 certain contracts. We're going to show through their witnesses
12 and the documents themselves that there is considerable
13 ambiguity as to whether those reimbursement rights are real or
14 imagined.

15 And with respect to the presentation trade secrets
16 themselves, I think it's just common sense that if we're
17 talking about those costs, you don't get reimbursed for theft
18 or paying off consultants to divulge confidential information.
19 If we're talking about a third party vendor or like a Deloitte
20 or MacKenzie or some research firm, and Clipper was doing this
21 legitimately, Clipper would be writing the checks to procure
22 that information. Clipper would be incurring those costs.
23 Whether they get reimbursed in the future is nothing that
24 Dr. Serwin has considered and they're going to cross-examine
25 him about that.

1 MR. MANCHEL: Your Honor, what you just heard at the
2 tail-end, that they're going to put in the contract arguments
3 through our witnesses, that's the issue. I asked Dr. Serwin
4 point blank, what he thought about the contracts that bore on
5 the issue of expenses. His answer was, I didn't read them. I
6 didn't consider them.

7 I want to be very, very clear, Your Honor. This is
8 obviously of critical importance to the defendants. Dr. Serwin
9 testified unequivocally that at the commencement of his work,
10 before he did a single thing he had been instructed to make no
11 distinction between any of the legal entities at issue in this
12 case. That was his instruction at the opening.

13 It's hard for me to phrase this for Your Honor but
14 we've given the Court I believe Dr. Serwin's deposition and his
15 report and cited for each category the exact evidence that he
16 gave. What you just heard from Attorney German is absolutely
17 brand new, 100 percent brand new. And I've never heard it from
18 Dr. Serwin's mouth. I've never heard it from a witness in this
19 case. There's never been an argument that the reason for the
20 unjust, never, there's been no evidentiary argument in 30(b)(6)
21 or an expert that the reason why the cost should be reimbursed
22 is because on September 1 there wasn't a deal. And the
23 contracts around September 1 would not have -- never has there
24 been a single witness in this case that presented it. I asked
25 and I hope Your Honor has a chance to read the deposition. I

1 asked every which way I could, do you have any alternate
2 theories? Anything else on which you base this? Have you
3 looked at the contracts? I asked him, did you even conclude
4 that Clipper avoided costs? And his answer was I didn't. I
5 didn't, it was that base level. I never got to because he
6 never offered anything and I asked him on what basis. On the
7 reasonable royalty that goes to really, Your Honor, to the
8 heart of the Court's order. Your Honor said in your order you
9 may not obtain a reasonable royalty based on what others would
10 have paid. That is the precise language that Dr. Serwin used
11 when I asked him the basis. I'm seeking \$29 million because it
12 would have been paid by the beneficial owners of the income
13 stream.

14 Then, Your Honor, in the same motion suggested that
15 they could come up with a theory on reasonable royalty such as
16 there is, in essence, an indirect benefit that Clipper would
17 appreciate. The notion that Clipper would have been happy, if
18 you will, that Fund II got something so it would have paid
19 more. They invented their report 3 times. They never asked
20 for another report after that order. They never offered up
21 anything else. The very first time that we heard these
22 arguments was last week in connection with the materials we
23 presented to the Court. That's it. In fact, I asked
24 Dr. Serwin straight out, did you assume for purposes of your
25 analysis that RPG was owned by Clipper. Answer, no.

1 I looked at every single theory that he put in the
2 report and every theory that he advanced in the deposition,
3 Your Honor. And we really painstakingly laid that out for the
4 Court in the Serwin brief. But this is, for us this goes
5 beyond undue prejudice. For us at this moment after 3 years to
6 have them put a witness on the stand and say the things that
7 have just been represented are being said, I would ask the
8 Court to please, if you're at all inclined to allow this to go
9 forward, just please take a look at the deposition testimony,
10 again, because I give you my word, Judge, you'll not find this
11 in the report and you'll not find it in the deposition. And
12 Your Honor was very, very strict with us and very, very strict
13 with them.

14 I want to say at one point you said you do this at
15 your peril. If you don't disclose it and you don't put it out
16 there, then you can't use it. So I've got two fundamental
17 issues. The stated basis for those two numbers, period, end of
18 story. That others would have paid. Period. That is, that's
19 indisputable. And I didn't hear the dispute here. The reasons
20 today for those numbers are completely new. And I didn't hear
21 Attorney German say they're not. I heard him say, this is what
22 Dr. Serwin will say. But if he's going to make this type of
23 presentation through Dr. Serwin, I would ask him to show me
24 where in the deposition and report this appeared because, Your
25 Honor, it really doesn't.

1 THE COURT: Okay. We're short of time. I'm going to
2 allow this slide in. Other objections will have to be
3 presented during the course of the deposition.

4 We'll take two or three minutes and we'll get
5 started.

6 (Recess)

7 (The following proceedings were had IN THE PRESENCE
8 AND HEARING OF THE JURY:)

9 THE COURT: Good morning. Welcome back.

10 Mr. German.

11 MR. GERMAN: Your Honor.

12 Good morning everybody.

13 Plaintiff calls Dr. Kenneth Serwin.

14 DR. KENNETH SERWIN, PLAINTIFF'S WITNESS, SWORN

15 DIRECT EXAMINATION

16 BY MR. GERMAN:

17 Q Good morning, Dr. Serwin. Would you introduce yourself to
18 the jury and to the Court?

19 A My name is Kenneth Serwin.

20 Q And you are the economist in this case for the damages
21 analysis for Hallmark?

22 A That's correct.

23 Q So tell the Court and jury, please, a little bit about
24 your background. What brings you to this case?

25 A Yes. I'm a PhD in economics. I work as a director at

1 Berkeley Research Group. It's an international economics and
2 management consulting firm. I have been doing this type of
3 work for approximately 15 years since I received my PhD in
4 economics.

5 Q What year did you receive your PhD, sir?

6 A 1997.

7 Q From what school?

8 A University of California, Los Angeles.

9 Q UCLA?

10 A Yes.

11 Q And any degrees prior to the PhD?

12 A Yes. I have an undergraduate degree in economics and I
13 also have a master degree in international relations.

14 Q From what institution?

15 A The undergraduate degree is from the University of
16 California at Berkeley and the master degree is from the London
17 School of Economics.

18 Q Have you specialized in your work, in your economics
19 practice in any particular area of discipline?

20 A Over my career as a practicing consulting economist I have
21 done a large amount of work dealing with intellectual property
22 evaluation and estimation of damages in commercial litigation.
23 I've also done damages in commercial litigation in other types
24 of disputes other than intellectual property but a large part
25 of my time revolves around intellectual property. Also I do

1 quite a bit of public policy work in terms of questions of
2 macro economic issues.

3 Q When you say, Dr. Serwin, when you say intellectual
4 properties, specifically what type of property are you
5 referring to?

6 A Intellectual property, usually there are many types but
7 patents, trade secrets, copyrights, trademarks are the main
8 types of intellectual property. I've done work in all of
9 those.

10 Q And have you, specifically with respect to trade secrets
11 which is what this case is about, have you over the course of
12 your career analyzed damages claims involving misappropriation
13 of trade secrets?

14 A Yes, I have, on a number of occasions.

15 Q I'd like to hand you, if I could, please, Exhibit 546A and
16 ask you to identify that for the Court, please?

17 A Yes. This is my curriculum vitae or resume.

18 Q And is it accurate and up-to-date?

19 A I believe it doesn't include the testimony in the Hallmark
20 matter that I've given.

21 Q Before this case?

22 A Yes.

23 MR. GERMAN: We'd offer 546A, please?

24 THE COURT: Without objection 546A will be admitted.

25 MR. GERMAN: Thank you.

1 Q Now, Dr. Serwin tell the Court and jury, please, what it
2 is that you were asked to do in this case?

3 A In this matter I was asked to evaluate and estimate
4 damages suffered by Hallmark due to the alleged
5 misappropriation of the presentation trade secrets.

6 Q And you completed that work?

7 A Yes, I have.

8 Q Now, just as a matter of housekeeping, I assume you're
9 being paid?

10 A Yes, I am.

11 Q What are you charging Hallmark for your work?

12 A My time, I charge \$600 an hour.

13 Q And there's additional charges from your firm?

14 A Yes. I have had a staff that has assisted me on this case
15 over the period I've been engaged.

16 Q When were you first retained?

17 A I believe at the end of 2009.

18 Q So you've been working on the case almost three years?

19 A That's correct.

20 Q And you have prepared certain reports for the case?

21 A Yes, I have.

22 Q Those have been shared with the defense?

23 A Yes, they have.

24 Q And you've appeared for a deposition in the case?

25 A Yes, I have.

1 Q Taken by defense counsel?

2 A Yes.

3 Q That was earlier this year?

4 A That was in May of this year, yes.

5 Q So from the end of 2009 through today, roughly, what has
6 your firm been paid by Hallmark?

7 A Somewhat over a million dollars.

8 Q Now, in connection with your work on the damages aspect of
9 the case, have you been asked to express any opinions at all on
10 liability issues?

11 A No, I have not. I don't have any opinions on liability
12 issues.

13 Q So the question of whether there were, in fact, trade
14 secrets or whether they were misappropriated is not something
15 you've considered?

16 A Well, I have taken that as an assumption that these are
17 valid trade secrets and as an assumption that they have been
18 misappropriated.

19 Q So on those assumptions then, you performed a damages
20 case?

21 A That's correct.

22 Q So what are the trade secrets then that you have evaluated
23 in analyzing the damages issues?

24 A In this matter there are five distinct, what I'll call
25 Power Point presentations. And those five distinct Power Point

1 presentations are what I evaluated.

2 Q Could we have Exhibit 487, please?

3 Dr. Serwin, Exhibit 487 has been spoken about
4 throughout the course of this week. Can you see it on the
5 screen there?

6 A I do.

7 Q Do you recognize the e-mail?

8 A I do.

9 Q Can we see the next page, please? Next page. The
10 attachments.

11 Dr. Serwin, this is an attachment to the Exhibit 487
12 OEC meeting from August of 2001. Is this one of the five
13 presentations?

14 A Yes, it is.

15 Q And the next one.

16 Similarly, the December OEC discussion,
17 December 2001. Is this one of the five presentations?

18 A Yes, it is.

19 Q And then thirdly, the Gold Crown Channel Analysis, January
20 2002. Is this one of the five presentations you considered?

21 A Yes, it is.

22 Q Then Exhibit 488, please.

23 Exhibit 488 has been discussed previously. Do you
24 recognize the e-mail?

25 A Yes, I do.

1 Q Let's go to the first attachment now.

2 This attachment to Exhibit 488 is called Hallmark
3 Greeting Card Industry, Understanding Industry Trends. Is this
4 one of the five presentations?

5 A Yes.

6 Q And the second one.

7 Then, finally, Small Competitors and the Deep
8 Discount Space. Is that the fifth of the five presentations?

9 A Yes, it is.

10 Q Slide 2, please.

11 Now, Dr. Serwin, you've prepared a number of slides
12 here to help talk through your testimony this morning?

13 A That's correct.

14 Q On this slide we see the five presentations you've just
15 described. Tell us what is being depicted on slide 2?

16 A Well, as you see there is a larger black circle. What
17 that represents is the totality of the information that
18 potentially was available to Clipper from the Hallmark
19 engagement with Monitor Consulting and the input and outputs of
20 that engagement. So that is all information that potentially
21 was out there that were Hallmark trade secrets.

22 Of that totality of potential information the five
23 presentations are a subset. And this is just reflecting that.
24 My analysis is based on that small subset of five presentations
25 and not everything.

1 Q And so what you've assumed is that the five presentations,
2 each one of the five presentations constitutes a Hallmark trade
3 secret?

4 A That was the assumption I was asked to make, yes.

5 Q Have you gone through the presentations, page by page, to
6 try to isolate or identify particular trade secrets within each
7 of the presentations?

8 A I reviewed the presentations but I've not done any work to
9 isolate individual specific slides as trade secrets separable
10 from the presentation as a compilation.

11 Q In your field of work in analyzing trade secret damage is
12 that a standard methodology that people in your profession
13 follow?

14 A In the analysis of economic damages it is taken as an
15 assumption. I ask the question what is the trade secret that
16 I'm looking to assess damages on. And as I understand the
17 trade secret, it is a compilation. That is standard to ask
18 that question and base the damages on that.

19 Q So describe for the Court and jury, please, Dr. Serwin,
20 the process that you went through, the work that you did, just
21 physically, what did you do to gather information and arrive at
22 the conclusions you're going to present this morning?

23 A The overall process is one where collecting and evaluating
24 the documents and production that was in this case so to a
25 large amount of pages upon pages upon pages of e-mails, other

1 documents of financial analyses, the legal filings in the case
2 to get a general broad understanding of the case. Having
3 interviews with relevant individuals to ask necessary questions
4 in order to understand and take assumptions with respect to
5 things that are outside the scope of my analysis to use as
6 input to the economic damage analysis.

7 Q You mentioned interviews. One of the Hallmark people who
8 testified in this case earlier this week was Wayne Strickland.
9 Did you interview him?

10 A Yes, I did.

11 Q Did you talk to him about consulting fees that Hallmark
12 paid Monitor?

13 A I did.

14 Q Another individual who has testified was John Maynard.
15 Did you interview Mr. Maynard?

16 A I have spoken with Mr. Maynard, yes.

17 Q What was the topic of that interview?

18 A To understand the calculation of the cost of underlying
19 research that is synthesized or summarized within the five
20 presentations.

21 Q Now, you told us that you had prepared a report, a written
22 report in this case?

23 A Yes, I did.

24 Q And that was provided to defense counsel and the Court?

25 A Yes.

1 Q And then you did an updated report a couple of months
2 later?

3 A Yes, I did.

4 Q That was also provided to the defense and the Court?

5 A Yes.

6 Q And those reports were prepared and submitted before you
7 testified in the deposition you gave in this case?

8 A Yes, they were.

9 Q We're not going to mark and offer the reports into
10 evidence because you're here to testify live but I'm going to
11 set the reports up there so that if you need to refer to them
12 or defense counsel wants to refer to them, they'll be available
13 to you?

14 A Okay.

15 Q For the record these are Exhibits 546 and 1347.

16 I'm going to set them on the ledge by the witness,
17 Your Honor.

18 Now, Dr. Serwin, let's start by asking you to
19 describe for the Court and jury the kinds, I'm not sure that's
20 the right word but the types of damages calculations that
21 you've made in this case?

22 A Yes. As I understand the potential remedies in this
23 matter, one potential remedy is what is termed unjust
24 enrichment or gains or costs that were avoided by the
25 defendants by virtue of the alleged misappropriation of the

1 trade secrets. So that is one aspect of the damages that I
2 calculated.

3 Q Okay. Stopping there for just a moment.

4 MR. MANCHEL: Your Honor, he's going to stop. Move
5 to strike, please.

6 THE COURT: Overruled.

7 MR. MANCHEL: May I approach.

8 THE COURT: Yes.

9 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
10 PROCEEDINGS WERE HAD:)

11 MR. MANCHEL: Thank you, Your Honor. There's no
12 evidence in the case there's been any -- no opinion -- avoided
13 by the defendant. I asked him specifically if they determined
14 that anything had been avoided by the defendants and his
15 response back to me, I did not. I did not assume the
16 defendants avoided any costs. I assumed simply there was joint
17 and several liability among the defendants. That was his
18 direct testimony on this specific point. And Your Honor struck
19 the one witness before him.

20 THE COURT: If you believe there is not joint and
21 several liability between Doctoroff and Monitor Clipper, you
22 said there was no direct joint and several liability.

23 MR. MANCHEL: No. No sir. I'm sorry.

24 THE COURT: I know what you mean but that's what you
25 said.

1 MR. MANCHEL: I'm sorry. I said his testimony was, I
2 asked him specifically did you assume or conclude in your
3 analysis that the defendant avoided costs? His answer was, no,
4 I did not assume that. His answer was, his answer was, I was
5 instructed to assume joint and several liability among the
6 non-parties and that's what I based my testimony on. The one
7 witness who raised the issue here, which I believe was
8 Mr. Maynard, he went on to say that the defendants avoided the
9 costs and Your Honor granted the motion to strike and did not
10 allow the testimony in. So there is no statement in this case
11 that these defendants avoided costs even as a threshold matter,
12 let alone the basis for it.

13 MR. GERMAN: Same argument, Your Honor. The report
14 says very clearly that Clipper and Doctoroff avoided costs.
15 That's, we're not going to joint and several liability.
16 Mr. Manchel is free to cross-examine him on who avoided the
17 costs. His testimony is that the defendants avoided the costs
18 and that's what the report says.

19 MR. MANCHEL: Your Honor, I can't cross-examine him.
20 I don't have any, I cross-examine him on what he offered. I
21 literally don't have a basis on which to cross-examine what
22 this gentleman is going to say on avoided costs.

23 THE COURT: If he said in his deposition that he
24 didn't delineate between the parties, that's a basis for
25 cross-examination.

1 MR. MANCHEL: But then they see these huge numbers
2 where there is no basis. This isn't a matter of impeachment or
3 cross-examination. This is your specific --

4 THE COURT: This case once we get past liability is
5 always going to be a battle of experts. I've allowed both
6 experts to offer their opinions. I'm going to allow this
7 expert to offer his opinion subject to cross-examination and
8 argument.

9 MR. MANCHEL: But will you allow him to offer his
10 opinion that is based on things that you have ruled out or will
11 you allow him --

12 THE COURT: I don't know what his opinion is going to
13 be until I hear it.

14 MR. MANCHEL: All right. Then I'll come back when
15 the opinion is offered and move to strike on the same motions.

16 THE COURT: Motion to strike now is overruled.

17 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

18 BY MR. GERMAN:

19 Q Okay. Let's try again. With respect to unjust
20 enrichment, the measure of damages you analyzed, what are the
21 components of it that you are stating in this case?

22 A The components of that are costs that otherwise would have
23 been incurred by Clipper in generating comparable research to
24 arrive at the same results of research that are incorporated in
25 the five presentations. And the cost that would have been

1 incurred by Clipper to generate the same results or comparable
2 results, not the same but comparable results to the
3 recommendations and conclusions that were incorporated in the
4 five presentations.

5 Q And is there another component to the unjust enrichment
6 analysis?

7 A There is another component which is fees that were
8 received by Clipper as a direct result of completing the
9 transaction to acquire the company RPG and management fees
10 received by Clipper related to the management and operation of
11 RPG.

12 Q Now, separate from your analysis of the unjust enrichment
13 analysis, have you prepared a second analysis and a different
14 measure of damages?

15 A Yes. The other measure of damages is what is called a
16 reasonable royalty. And what a reasonable royalty is is under
17 the assumption, it's a hypothetical assumption, that the two
18 parties in this case, Clipper on the one side being the alleged
19 misappropriator and Hallmark on the other side as the owner of
20 the trade secrets, would agree to license them or Hallmark
21 would grant a right to Clipper to do what they did with the
22 trade secrets and there would be a price for that license and
23 that's the reasonable royalty.

24 Q Can you give us an example or two of how royalties in this
25 kind of setting work in the real world?

1 A In the real world royalties can take place in a number of
2 settings. I mean, a simple example of that is usually related
3 to patents. So, for example, consider if we had an inventor
4 of, take for example, a technology related to a hybrid engine
5 for a car. And the inventor has that technology and is granted
6 a patent. So what the patent is is granting the inventor an
7 exclusive right to exploit that technology. Well, an inventor
8 isn't a car manufacturer. So the inventor can't really overly
9 benefit from his invention. The car company can overly benefit
10 by incorporating that invention in cars. So those two parties
11 will negotiate with each other and a license, in certain
12 instances, will be granted by the inventor to the auto maker to
13 use that technology in building cars that use that hybrid
14 engine. And there will be a fee for that and that's a royalty.

15 Q So in this case you mentioned that the analysis you've
16 done of the reasonable royalty is in the context of a
17 hypothetical negotiation between Clipper on one side of the
18 table and Hallmark on the other?

19 A Yes. It's hypothetical in the sense that this didn't
20 happen and these two parties aren't really sitting at a table
21 doing this. But in terms of a structure and this is a common
22 structure that is used in economic damages related to
23 intellectual property, how are we going to come up with the
24 price? Well, what we're trying to do is think about what
25 would, essentially, a comparable scenario where the two parties

1 do sit down at the table and what would they have come up with?
2 And that hypothetical negotiation isn't really a real world
3 negotiation for a number of reasons. Number one, it didn't
4 happen and probably wouldn't happen. But, second, there are
5 certain rules under which the analysis of that hypothetical
6 negotiation would take place. Such rules are that it would
7 take place on the eve of the bad act happening. So in this
8 case on the eve of misappropriation, before it actually
9 happened the two parties would sit down and say, okay, let's
10 negotiate a price for this.

11 Q Why is that date significant? What is the date of the
12 negotiation you've used in this case?

13 A The date I've used is approximately September 1, 2005.

14 Q Why then?

15 A Because that's right in between the two sets of
16 presentations. The first e-mail with the first three
17 presentations was August 25, I believe. And the second e-mail
18 was in the first week of September. I took right in the middle
19 there.

20 Q And you understand, Dr. Serwin, as we saw in the Exhibit
21 487, the first three presentations were sent to Mr. Doctoroff
22 and Mr. Kim at Clipper and members of the standing case team.
23 Do you know what that means?

24 A Yes, I do.

25 Q And the second two presentations that were part of Exhibit

1 488 were sent to the standing case team itself, true?

2 A That's correct, yes.

3 Q So between those two e-mails is September 1, 2005 and
4 that's when in your analysis you constructed this hypothetical
5 negotiation between Hallmark on the one hand and Clipper on the
6 other?

7 A Yes.

8 Q Let's have slide 3, please.

9 So just as an overview before we get into the nuts
10 and bolts on these two measures of damages, Dr. Serwin, tell us
11 what you have concluded with respect to each analysis you've
12 done?

13 A Yes. With respect to the unjust enrichment with the two
14 parts the avoided costs and the fees received. That in total
15 is \$17.6 million. Alternatively, my calculation of the
16 reasonable royalty is a lump sum of \$29.2 million.

17 Q Now, let's start the breakdown of these numbers with the
18 unjust enrichment. Okay?

19 And we'll go to slide 4, please.

20 So explain to the Court and jury, please, Dr. Serwin,
21 what we see on slide 4?

22 A Yes. Well, of the \$17 million, approximately \$17 million
23 of unjust enrichment, 17.6, 11.3 of that is from costs that
24 Clipper avoided incurring associated with the five presentation
25 trade secrets. And that is split into two parts. One is the,

1 as I mentioned, monies that Clipper avoided incurring to obtain
2 comparable recommendations and conclusions from consulting
3 services that were in the five presentation trade secrets. And
4 that portion is \$5 million. Then the other portion is the cost
5 that Clipper avoided incurring from not having to create,
6 itself, the underlying research, the results of which were
7 synthesized or summarized in the five presentations.

8 Q In the context of this case and the record as you
9 understand it, when would those costs have been incurred?

10 MR. MANCHEL: Objection.

11 THE COURT: Step up.

12 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
13 PROCEEDINGS WERE HAD:)

14 MR. MANCHEL: Offering opinion, conclusion, Your
15 Honor, that he's never offered in his report or in his
16 testimony.

17 MR. GERMAN: He's going to say the cost would have
18 been incurred in the due diligence process. That's what the
19 report says. That's what the testimony has been.

20 THE COURT: Objection overruled.

21 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

22 BY MR. GERMAN:

23 Q Again, Dr. Serwin, in the context of this case, the record
24 as you understand it, when would these costs have been
25 incurred?

1 A Well, in order to carry out the due diligence on the
2 acquisition or potential acquisition of RPG that was taking
3 place in and around September 1 of 2005, the recommendations
4 and conclusions that were in the five presentations were used
5 and the understanding of the results of the research were used
6 and so this would have had to have been created or obtained by
7 Clipper at around that same time.

8 Q During the due diligence process?

9 A Yes.

10 Q Now, let's focus on the comparable consulting component of
11 \$5 million. We've heard Mr. Strickland testify that that
12 constituted fees that Hallmark paid to Monitor. Are you
13 assuming that Clipper would have hired Monitor to do the
14 consulting work?

15 A No, that's not a necessary assumption. What I'm assuming
16 is that Clipper used and benefited from recommendations,
17 conclusions that came from a strategy consulting firm that had
18 been incorporated, a large number of inputs, and taken those
19 inputs related to the greetings industry, the research that
20 they had, other inputs that they had, and they then compiled
21 that and created these recommendations, conclusions for
22 Hallmark.

23 So in order for Clipper to benefit from those same
24 recommendations and conclusions Clipper would have to be able
25 to obtain comparable consulting results. Now whether they

1 would get them from Monitor or somewhere else is not a
2 necessary assumption.

3 Q So why are you using the Monitor charges to Hallmark in
4 your analysis?

5 A I believe they are a reasonable proxy for the costs that
6 Clipper would have to incur to get comparable results. The
7 cost that Hallmark incurred with respect to its engagement or
8 engagement it made with Monitor Consulting was one where a
9 major greeting card company with all of the available input
10 that a greeting card company that's been in business as long as
11 Hallmark has brought to bear and provided to Monitor Consulting
12 and the interactions that Hallmark and its executives and its
13 knowledge were able to combine with Monitor Consulting's
14 strategy consultants are probably the lowest cost that would be
15 incurred to generate comparable results from that consulting
16 project. So I felt that was a reasonable proxy or estimate for
17 the cost that Clipper would incur.

18 Q Okay. Thank you.

19 MR. MANCHEL: Your Honor, move to strike.

20 THE COURT: Overruled.

21 MR. MANCHEL: May I approach.

22 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
23 PROCEEDINGS WERE HAD:)

24 MR. MANCHEL: I'm sorry, Your Honor. I have to keep
25 a record going. This gentleman just testified these are the

1 costs that Clipper incurred. I asked him specifically who do
2 you think is going to incur the cost, sir?

3 ANSWER: With respect to this, it didn't -- under the
4 assumption I was asked to operate, it didn't matter. So the
5 assumption who ever incurred, who, I'm sorry, who ever avoided
6 the cost, Monitor Clipper would be liable.

7 He's never offered the opinion that Monitor Clipper
8 and I didn't make any objection when they were talking about
9 the theories and the numbers but now we're starting to dive
10 down below. It's I don't know what.

11 MR. GERMAN: That's just simply not the case. The
12 report on every single page I have, I'll show you the report,
13 says Clipper and Doctoroff avoided the costs. He's saying if
14 the costs were incurred, they would have been incurred by
15 Clipper and Doctoroff. It's been consistent. It's their
16 theory of the case they can shift the cost off to somebody
17 else, not ours.

18 MR. MANCHEL: Your Honor, I read the report. I saw
19 the language. I asked him the question on what do you base
20 your conclusion that they were incurred? And his answer was,
21 on the instructions of counsel from Hallmark.

22 THE COURT: Well, and I expect you'll ask him that
23 question on cross-examination, Steve. I'm --

24 MR. MANCHEL: Your Honor, it's not an impeachment
25 issue.

1 THE COURT: If he said different in his deposition,
2 if he said something different in his report you can confront
3 him with those. This all goes to credibility and the
4 reliability of his opinion.

5 MR. MANCHEL: With all due respect, Your Honor, this
6 isn't an impeachment issue or liability issue. Your specific
7 order was they may not offer at trial any new opinion. It's
8 not so. I'll show that it's a new opinion and maybe at that
9 point the testimony will be struck. But with an expert witness
10 I don't think the standard is the same as impeachment or
11 reliability. I think --

12 THE COURT: Mr. Manchel, I don't argue with
13 attorneys. I made my ruling. Step back.

14 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

15 BY MR. GERMAN:

16 Q Okay. Now, Dr. Serwin, I'm going to hand you what is
17 marked as Exhibit 547D. Can you identify that exhibit for the
18 Court and jury?

19 A Yes. This is an exhibit from my updated and revised
20 report.

21 Q And this catalogs the total costs of the BMR that was part
22 of your analysis of the \$5 million consulting fee?

23 A Yes.

24 MR. GERMAN: Your Honor, we'll offer 547D, please.

25 MR. MANCHEL: Same objection, Your Honor.

1 THE COURT: Pardon?

2 MR. MANCHEL: Continuing my objection.

3 THE COURT: Yes. We'll show your objection as
4 continuing. 547D is admitted over defendant's objection.

5 BY MR. GERMAN:

6 Q So, Dr. Serwin, explain to the jury what you see in
7 Exhibit 547D?

8 A Yes. These are the costs of the entirety of the BMR
9 project that Hallmark engaged Monitor Consulting to perform.
10 It is broken out into the five sub-components and of those five
11 sub-components, as I understand it, the five presentations
12 reflect the totality of the first two components, the greetings
13 and the channel analysis. The total of which was \$5 million.

14 Q Hand you now Exhibit 547C. Ask you to identify this
15 exhibit for the Court and jury, please?

16 A Yes. This is another exhibit from my updated and revised
17 report.

18 Q And this substantiates your back up for the \$5 million
19 figure?

20 A Yes.

21 MR. GERMAN: Your Honor, offer 547C.

22 THE COURT: 547C is admitted over defendant's
23 continuing objection.

24 BY MR. GERMAN:

25 Q Now, explain then, Dr. Serwin, what we see in Exhibit

1 547C?

2 A This is essentially very similar to the prior schedule
3 except this one has just the costs related to the greetings and
4 the channel components of the BMR project.

5 Q Now, at the upper right of Exhibit 547C it says updated
6 and revised. Can you explain that for us, please?

7 A Yes. I had a prior report, a March report that was
8 different than the May report that I provided. And there was a
9 change and actually a reduction related to this exhibit and
10 others.

11 Q You reduced the number from some higher number down to
12 5 million?

13 A Yes.

14 Q That was based on what?

15 A That was based on an initial understanding which proved to
16 be incorrect that there was, that the five presentations also
17 incorporated work from one of the other three components of the
18 BMR project, aside from the greetings and channel components.

19 Q Finally, let me hand you Exhibit 547E. Identify this for
20 us, please?

21 A Yes. This is another schedule from my updated and revised
22 report.

23 Q What does this show? 547E?

24 A 547E isn't up there yet.

25 Q I know. It's in your hand.

1 A This is another schedule from my report.

2 Q What does it show?

3 A This schedule, it just breaks out the actual payments from
4 Hallmark to Monitor for the various components of the BMR
5 project by month.

6 Q Okay. Where did you obtain the information that we see on
7 Exhibit 547E?

8 A On 547E I obtained that information from the documents in
9 this case.

10 Q Is this part of your interview with Mr. Strickland?

11 A This was part of my interview with Mr. Strickland, was
12 about the information. And the information, itself, was in the
13 record that I received.

14 MR. GERMAN: Your Honor, offer 547E.

15 THE COURT: 547E will be admitted over defendant's
16 objection.

17 BY MR. GERMAN:

18 Q Now, Dr. Strickland, tell us then what we're seeing on
19 this Exhibit 547E?

20 A What we're seeing on this one is just by category of the
21 various component projects. As you see, if you can look over
22 on BMR category, it says which of the component categories of
23 the total BMR project we're looking at. And it shows by month
24 the payments that were made from Hallmark to Monitor for that
25 component.

1 Q And we see a number down at the bottom right, a little
2 fuzzy. Can you read that for us?

3 A Yes. I believe \$10,280,000.

4 Q And that was the total fees for the entire, just fees for
5 the BMR?

6 A Yes. The fee portion, the agreed upon fee portion between
7 Hallmark and Monitor.

8 Q No expenses in there?

9 A Not in that number, no.

10 Q Do the expenses represent the difference between the
11 contract number and the \$12 million number we looked at a
12 moment ago?

13 A Yes, they do.

14 Q Now, with respect to the channel analysis and the
15 greetings business model?

16 A Yes.

17 Q We see that the billings continued to May of 2002. What
18 was your understanding of that process?

19 A My understanding of that process is that was a mechanism
20 to arrive at the fixed fee payments from Hallmark to Monitor.
21 And I queried whether or not those payments related directly to
22 work performed in that particular month. And I was told they
23 did not directly relate necessarily to the work performed in
24 that month but rather that was the billing mechanism that was
25 performed by Hallmark and Monitor to have the fixed fee come

1 out at the end.

2 Q And who provided you that information?

3 A Mr. Strickland provided that information.

4 Q So what is your understanding of when the work that we see
5 in the five presentations was completed?

6 A My understanding is that the entirety of the work on the
7 greetings and channel project was completed and reflected in
8 the five presentations.

9 Q When?

10 A As of the date of the presentations.

11 Q Now, did you examine the underlying documentation for the
12 data that we see on Exhibit 547E?

13 A Yes.

14 Q All right. Let's go back to slide 4, please.

15 Now, I'd like to move the discussion, Dr. Serwin, to
16 the right hand side of your pie chart to the comparable
17 research, the \$23 million number?

18 A Yes.

19 Q Where did you obtain the information that builds to the
20 \$6.3 million?

21 A That information was provided to me by Mr. Maynard of
22 Hallmark.

23 Q Did you examine the underlying documentation, bills and
24 payroll reports and so forth to build to that number?

25 A I believe staff under my direction looked through the

1 underlying business documents that were provided to us for
2 those payments.

3 Q I'll hand you now Exhibit 547A. Identify that document
4 for the Court and jury, please?

5 A Yes. This is another schedule, Schedule B2, from my
6 updated and revised report.

7 Q What does it reflect?

8 A This schedule reflects the, a number of things. It
9 reflects the, all of the underlying research that was performed
10 by Hallmark related to the information that was provided to
11 Monitor Consulting as part of the BMR project. That's one
12 thing it has.

13 Then it has the portions of that totality of research
14 that Mr. Maynard identified was actually reflected in the five
15 Power Point presentations, which is less than all of it. And
16 then this document also has a reflection which of the Power
17 Point presentations reflected that research.

18 Q So the exhibit then, 547A, was prepared by you and under
19 your direction?

20 A Yes.

21 Q From the documents received in the case?

22 A From the documents received in the case and from
23 Mr. Maynard.

24 Q And Mr. Maynard.

25 With that, Your Honor, we'll offer 547A.

1 THE COURT: 547A is admitted over defendant's
2 objection.

3 BY MR. GERMAN:

4 Q I'm not going to go through all of the details on the
5 document, Dr. Serwin. But just so the jury and Court get a
6 sense of the format, tell us how it's laid out column by
7 column?

8 A Well, the, on the far left what you're seeing are every
9 item of research that was performed by Hallmark that underlay
10 the research that was provided to Monitor Consulting. And that
11 is totaled in the first bolded column which says subtotal.
12 Right there. And that amount adds up to --

13 Q We'll get to the numbers.

14 A Then the next bolded column is the amount of that research
15 that was actually in the five presentations.

16 Q You see the five presentations here to the far right?

17 A Right. So the second bolded which is next to subtotal is
18 the total of that particular category of research that was
19 incorporated in the five presentations. And then to the right
20 are those five presentations to show which ones of the five
21 that research was actually reflected in.

22 Q Okay. And you've done that for each category of research
23 throughout the document?

24 A Yes.

25 Q So then let's go to the, Cindy, to the final page of the

1 document. Page 8.

2 And so as you scroll down through the analysis,
3 tracing the, all of the research from the BMR into the five
4 presentations, what then can you see at the bottom, the
5 numbers?

6 A So what we have under that subtotal column all the way in
7 the bottom blue line, I know it's hard to see there is the
8 total of all the research which was 10 point, approximately
9 \$10.4 million. And then the, next to it is the total of that
10 10.4 approximate, how much was in the five presentations and
11 that's \$6.3 million.

12 Q And the 6.3 million is shown where, sir?

13 A If I can, it's in that right there. Yes.

14 Q Have to get a different color. Now, let's move off of the
15 fees and the research, I'm sorry, the consulting fees and the
16 research and over to the next component of your unjust
17 enrichment analysis, the fees paid to Clipper, okay?

18 A Okay.

19 Q Tell us what we see on slide 5?

20 A This is the portion of the unjust enrichment that is
21 related to fees that were received by Clipper. Those fees are
22 in two categories. One is the fee, it's labeled here success
23 fees or transaction fees, I believe it's in the contract as
24 transaction fees, that Clipper received as a result of the
25 successful transaction to acquire RPG. And that is

1 \$4.76 million.

2 Q Let's stick with that one for just a moment.

3 THE COURT: Just a moment.

4 MR. MANCHEL: Same objection.

5 THE COURT: Overruled.

6 BY MR. GERMAN:

7 Q Let's stick with that left-hand side of the pie chart for
8 the moment. And may we have Exhibit 420, please?

9 Dr. Serwin, Exhibit 420 is a stipulated or agreed
10 exhibit in the case. Can you tell the jury what we see here?
11 What this is?

12 A Yes. This is, reflects the \$4.76 million transaction fee
13 that was received by Clipper. It's based on the ultimate
14 purchase price of \$317,500,000 and that's calculated as
15 1.5 percent of that.

16 Q While we're here, what is the number that we see just
17 below that, that \$52,000 number?

18 A That is the other component of fees received by Clipper
19 was the management fees related to its management and operation
20 of RPG and that is, I believe, the first payment of that.

21 Q Let's focus on the \$4.7 million and we see the footnote 1
22 out to the right there?

23 A Yes.

24 Q If we can skip over in the exhibit, Cindy, please, to the
25 page that has that footnote. There we go.

1 Now, how do we know, Dr. Serwin, that the success fee
2 of \$4.7 million was paid to Clipper?

3 A Well, as reflected in this document, it was paid into the
4 bank account of Monitor Clipper Partners L.L.C.

5 Q And this number says 4.8 million. What is the difference?

6 A If you go back up to that first page, there were two items
7 in footnote one. And that is the sum of those two items of
8 footnote one. One of them being the \$4.76 million transaction
9 fee.

10 Q If we could have the first page of Exhibit 420, please, to
11 show that.

12 So it's the 4.7 million plus this reimbursement of
13 MCP out of pocket expenses of 101,000?

14 A That's correct.

15 Q And that money was wired directly into Clipper's bank
16 account?

17 A That's what the document reflects.

18 Q Okay. Now, back to the pie chart, please, slide 5.

19 Now, let's look at the right-hand side of the pie
20 chart, fees received to manage RPG 1.55 million. What does
21 that represent again?

22 A That reflects there was a contractually agreed upon
23 management fee for Clipper from RPG. And that is the sum of
24 those management fees over the time period that Clipper managed
25 RPG.

1 Q What documentation did you examine to derive that number?

2 A I believe I examined the actual invoices from Clipper to
3 RPG.

4 Q Did you prepare a schedule of that?

5 A Yes, I did.

6 Q I'll hand you Exhibit 547H. Tell us what we see on 547H,
7 please, Dr. Serwin?

8 A On here is a listing of the invoices for the management
9 fees listing them out.

10 Q That's based on your examination of the invoices submitted
11 by Clipper to RPG?

12 A Yes.

13 MR. GERMAN: Offer Exhibit 547H.

14 MR. MANCHEL: Same objection.

15 THE COURT: 547H is admitted over defendant's
16 objection.

17 BY MR. GERMAN:

18 Q Now, the 1.55 million that we showed on the pie chart on
19 the management fees, do you see it on the schedule?

20 A Yes.

21 Q And the 4.7 million transaction fee we looked at earlier?

22 A That is also on the schedule.

23 Q For a total of \$6.3 million?

24 A Yes.

25 Q And that \$6.3 million is the Clipper fee portion of your

1 unjust enrichment analysis?

2 A That is the portion of my analysis that is the fees
3 received by Clipper, yes.

4 Q Did your analysis include any consideration of what
5 Clipper did with those fees after they were paid?

6 A No, it did not.

7 Q So I'll hand you Exhibit 547G. Tell us what you see on
8 Exhibit 547G, sir?

9 A This is a summary of the items that we've seen on the pie
10 chart before that had the two components of the unjust
11 enrichment, one being the two items of avoided costs and the
12 other being the fees received.

13 MR. GERMAN: Your Honor, offer 547G.

14 THE COURT: 547G will be admitted over defendant's
15 objection.

16 BY MR. GERMAN:

17 Q Display, please.

18 So just to recap where we are through the unjust
19 enrichment analysis, you told us about the costs incurred to
20 create research?

21 A The cost that would have been incurred and therefore
22 avoided.

23 Q And those are the costs of the research that are traced
24 into the five presentations?

25 A That's correct.

1 Q Then we see a \$5 million number and that is the fees paid
2 to Monitor for the five presentations?

3 A That is the, well, that is the 5 million is the fees paid
4 by Hallmark to Monitor Consulting and that's reflective of the
5 consulting fees that would have been incurred by Clipper and
6 were avoided.

7 Q And then on the fees earned of the analysis we have the
8 deal fee, success fee of 4.67 million?

9 A Yes.

10 Q Plus the management fee?

11 A That's correct.

12 Q So these two numbers together were where we started in the
13 presentation, \$17.6 million?

14 A That's correct.

15 MR. MANCHEL: May I approach?

16 THE COURT: Yes.

17 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
18 PROCEEDINGS WERE HAD:)

19 MR. MANCHEL: Your Honor, you ruled they may not
20 combine these costs into the \$17 million figure. They -- to
21 pick either or. He just presented these, if you combine these
22 two figures together 17 million. Your rulings have been
23 consistent on this issue. It's either or in terms of the
24 presentation the jury cannot pick both. Now, they're looking
25 at a \$17 million figure. I don't know if it's something to

1 handle in terms of instructions, in limine instruction but I
2 wanted to raise it now for the record.

3 THE COURT: I'm not sure I understand, Steven. The
4 unjust enrichment consists of both avoided costs and gains.

5 MR. MANCHEL: Correct.

6 THE COURT: The avoided costs here were 11 million
7 the gains were 6 million dollars.

8 MR. MANCHEL: Your Honor has ruled they have to pick
9 either. They can't say the unjust was 17 million because
10 you've got one if not two rulings directly on this issue. They
11 must choose one or the other.

12 MR. GERMAN: No, that's not. What Your Honor held in
13 the orders is that there can be no double counting, no
14 duplication of the fees. Cited a case in the footnote said
15 some times there are, you have to separate. But here we have
16 very carefully separated the two so there is no overlap between
17 the two components of the unjust enrichment.

18 THE COURT: Which order are you talking about, Steve?

19 MR. MANCHEL: I believe it's in the motion in limine
20 order. If I can go back to the table I can double check for
21 you.

22 Here it is, Your Honor.

23 THE COURT: He appears to be right.

24 MR. GERMAN: I don't think so, Your Honor. If I'm
25 thinking of the order, I don't have it handy. It is the

1 Salisbury Laboratories footnote that you, that you cited at
2 page 6 of the expert Daubert order. The situation where the
3 cost savings are used to value the defendant's gain. There
4 can't be any double counting. We're not using their cost
5 savings as their gain. We're using their cost savings gains,
6 the fees that were paid are entirely separate from the cost
7 gain. We're not using one as the other. There's no connection
8 between--

9 THE COURT: Rather than delay the trial further I'm
10 not going to rule your objection at the moment but I will rule
11 it. If I agree with you, I will tell the jury to disregard one
12 or the other.

13 MR. GERMAN: Or if that is the Court's ruling we
14 could deal with it in instructions.

15 MR. MANCHEL: Thank you, Your Honor.

16 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

17 BY MR. GERMAN:

18 Q Okay --

19 THE COURT: Just a moment.

20 Mr. Manchel, what was the document number again?

21 MR. MANCHEL: Document 384.

22 THE COURT: You may proceed, Mr. German.

23 MR. GERMAN: Thank you, Your Honor.

24 BY MR. GERMAN:

25 Q Okay. I believe that concludes the presentation on the

1 unjust enrichment presentation, Dr. Serwin.

2 A Yes.

3 Q Let's move to the reasonable royalty calculations you've
4 done. Just so everybody understands where we're going with
5 this. Is the reasonable royalty an alternative measure of
6 damages to the unjust enrichment?

7 A Yes, it is.

8 Q You don't combine them?

9 A No. They're not combined or aggregate.

10 Q One or the other?

11 A One or the other.

12 Q Okay. Have you done this reasonable royalty kind of
13 analysis before in other trade secret cases or intellectual
14 property cases in general?

15 A I've done it in other trade secret matters. I've done it
16 in patent matters. I've lectured on it. I've actually written
17 on it.

18 Q Let's have slide 7, please.

19 Now, just so we get a frame work here, explain to the
20 Court and jury what we see on slide 7?

21 A What this slide does is just, I'm trying to help you
22 understand the context of this thing called a hypothetical
23 negotiation. So what we're doing here is we're, as I said, on
24 the eve of misappropriation, so around the first of September
25 2005, we're putting Clipper, the defendants, in a room with

1 Hallmark and they're going to negotiate over a license for the
2 misappropriated trade secrets. Each side in the negotiation is
3 going to have their own view point. On one side we've got
4 Hallmark, who is going to be looking at this and saying, well,
5 what is going to happen? What are we, do we anticipate
6 happening if we license these trade secrets to the defendants.
7 And as the green balloon on the left shows they could expect to
8 lose profits.

9 On the other side of the table is the defendants and
10 what are they going to be viewing with respect to obtaining a
11 license to the trade secrets. And they're going to be viewing
12 this is going to provide financial benefits.

13 Now, what is one thing to keep in mind about
14 hypothetical negotiations that is very, very important besides
15 the date of the negotiations. Probably everybody's negotiated
16 for a new car or a house, you know, other things. And you have
17 your side and you know what you're willing to pay. You don't
18 really what the other side's position is. You're sort of
19 bargaining. Each side has their cards close to the vest.
20 You're going to come out with an answer and both sides,
21 hopefully, will be satisfied with that bargain. But you don't
22 really know where the other's position was.

23 That's not the rules under which we conduct this
24 hypothetical negotiations. The cards are down. So in this
25 particular negotiation Hallmark knows what Clipper would expect

1 to gain. And Clipper knows what Hallmark would expect to lose.
2 All the facts are open to both sides in this negotiation.

3 Q Now, are there different kinds of royalties that are
4 analyzed in trade secret cases or intellectual property cases,
5 generally?

6 A Well, the royalty can take two different forms. Royalty
7 can take the form of, we'll call it a lump sum. So, all right,
8 we're going to give you a license. Here's a check. We're
9 done. You have a license, you can do with it what you will.
10 That's one type of royalty, a lump sum royalty.

11 The other type of royalty is, okay, we'll call it a
12 running royalty. We'll put some percentage of something and
13 you'll pay us over time. So in many cases it's a percent of
14 sales. And the royalty will be 5 percent of your sales per
15 year and you write the check every year. So those are the two
16 types.

17 Q And have you computed in this case both types of
18 royalties?

19 A I have. I computed the reasonable royalty as both a lump
20 sum and as a running royalty.

21 Q I'm going to hand you, Dr. Serwin, 547F. Tell us what
22 we're seeing in 547F, please?

23 A Yes. This is another schedule from my updated revised
24 report. This is the ultimate summary schedule from that
25 report. And on here, besides a calculation of those numbers

1 we've already looked at for unjust enrichment, there is the
2 number for what the reasonable royalty as a lump sum would be
3 and there is also a number here for what the reasonable royalty
4 as a running royalty would be.

5 MR. GERMAN: May I approach the bench for just a
6 moment, please, Your Honor?

7 THE COURT: Mr. Manchel.

8 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
9 PROCEEDINGS WERE HAD:)

10 MR. GERMAN: I just noticed this exhibit did not have
11 the confidentiality stamp at the top taken off as we agreed to
12 do so I'm not going to offer it at this time. I'd like to get
13 it cleaned up maybe later today and put it in the record. I'll
14 just ask him what the numbers are now.

15 THE COURT: While you're here, I'm satisfied that
16 Steven is correct, that you can't recover both for costs
17 savings and profit returned so how do you want to be handle
18 that?

19 MR. GERMAN: Instructions. If we go back to it, I
20 don't intend to go back to it in the testimony.

21 THE COURT: Steven?

22 MR. MANCHEL: I think they should be told something
23 contemporaneously that the \$17 million figure has to be split
24 into two pieces. That it can't be cumulative. I'm happy to
25 have Charlie do that with the witness, through the witness. I

1 don't know if it's appropriate for Your Honor to make a
2 statement at this point in terms of granting the motion to
3 strike and as a result of that speak with the jury on the
4 issue.

5 THE COURT: I assume that you're going to be asking
6 for the larger of the two numbers.

7 MR. GERMAN: Yes, if we have to, Your Honor. But I
8 would like to be heard a little bit on this. That is not the
9 way we read the order or the Salisbury Lab case.

10 THE COURT: We'll deal with it later.

11 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

12 BY MR. GERMAN:

13 Q So, Dr. Serwin, we're looking at Exhibit 547F that I
14 handed to you and we're not going to display it at this time
15 but what are the two royalty numbers that you have computed?

16 A The royalty as a lump sum is approximately \$29.2 million
17 and the royalty as a running royalty is approximately
18 \$23 million.

19 Q We saw the \$29.2 million at the beginning of your
20 presentation, right?

21 A That's correct.

22 Q So which type of royalty in this case do you believe is
23 the more appropriate one?

24 A I believe a lump sum royalty is economically more
25 appropriate in this matter.

1 Q Let's go to slide 8, please.

2 Tell us, Dr. Serwin, why it is you believe that a
3 lump sum is more appropriate analysis in the facts of this
4 case?

5 MR. MANCHEL: Objection, Your Honor. May we
6 approach?

7 THE COURT: Yes.

8 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
9 PROCEEDINGS WERE HAD:)

10 MR. MANCHEL: The fourth bullet point, no capital
11 constraint to pay lump sum. His testimony was that the absence
12 of capital constraint to pay the lump sum would be because Fund
13 II had assets or borrowers other than Clipper would be able to
14 borrow the money. There is absolutely no testimony or evidence
15 in the case that Clipper would not have a capital constraint
16 and that's as a basis for his -- primarily he offered for his
17 opinion.

18 MR. GERMAN: He will refer to Exhibit 105 which is in
19 the case already. That's the initial offer letter from July of
20 2005. Clipper letterhead signed by Bill Young on behalf of
21 Clipper. It states specifically that capital or finance is not
22 an issue that we have. He offers \$305 million. There's no
23 debt commitment in place. There's no equity in place. It's
24 Clipper and Clipper alone, July 2005, saying that capital is
25 not a constraint.

1 MR. MANCHEL: That's my exact point. That's never
2 been offered. I'm giving the Court my word that has never been
3 offered.

4 MR. GERMAN: It's an exhibit in the case.

5 MR. MANCHEL: The letter has never been cited by
6 Dr. Serwin.

7 MR. GERMAN: It's been cited.

8 MR. MANCHEL: That it supports his argument there is
9 no capital constraint?

10 THE COURT: You can cross-examine him on it.
11 Objection overruled.

12 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

13 BY MR. GERMAN:

14 Q Explain to the Court and jury, please, why you believe the
15 lump sum royalty is a more appropriate measure in this case.

16 A In general from an economic point of view the reasons why
17 one may have a running royalty instead of a lump sum royalty,
18 the primary reason is a question of risk sharing. In
19 situations where it's uncertain how valuable the licensed
20 property is going to be and how much money could potentially be
21 made from the licensed property, then it's more likely that the
22 two parties will share the risk and sharing of the risk is more
23 for a running royalty. Because if you say, well, we'll put a
24 percent of sales on it and see how much the sales are. If the
25 sales are big, there's a lot and if the sales are low, there's

1 a little. So that's sharing the risk.

2 If the parties are going to be willing participants
3 in sharing that risk and if the situation related to the
4 property is more uncertain.

5 This is a situation where the second two bullet
6 points note, it's not that uncertain. Hallmark at the time of
7 this negotiation has already incorporated the recommendations
8 and conclusions of the -- that are in the presentations trade
9 secrets that successfully changed aspects of their business
10 from incorporating those recommendations and conclusions. And
11 as I said at this hypothetical negotiations both sides know the
12 cards are down. So both sides know this information was
13 valuable and beneficial and it is working.

14 It's also a situation where it's not like a brand new
15 technology. I'll go back to the hybrid car example I gave you.
16 You don't really know how many people are going to buy hybrid
17 cars or are not going to buy hybrid cars. Think of the Chevy
18 Volt, for example, which we don't know, it didn't work as well
19 as people thought it would work. This isn't that kind of
20 situation. The greeting cards industry is a very stable,
21 mature market. How many cards are sold every year is pretty
22 clear and known but by both parties here and how it may grow or
23 not grow, the overall market that this intellectual property
24 that is incorporated in the presentation trade secrets could
25 generate is known pretty well by both sides.

1 The other thing is the first bullet point which is
2 very important which is Hallmark is going to be much more risk
3 averse with respect to this license than the negotiating
4 position of Clipper and the defendant. Because Hallmark has a
5 trade secret and a trade secret is valuable intellectual
6 property as long as it is secret. And compared to a patent,
7 for example, if you have a patent, everybody knows what the
8 patent is. It's published. It's right there. There is no
9 secret about it but there is legal protection. Simply put, you
10 can't use my patent. If you want to do this, you have to
11 license it or you simply can't do it. The government comes in
12 and protects.

13 Trade secret, once it's public, not secret any more.
14 So Hallmark is licensing something that once it licenses it,
15 okay, there is a huge risk of this getting out and that's it,
16 it's gone. And so if it turns out that from the license RPG
17 doesn't have the success, so say we're in a running royalty,
18 going to be 5 percent of sales. And RPG doesn't have success
19 with this, okay, there's no big money to Hallmark. It's gone.
20 It doesn't get it. But it's trade secrets are gone. That's
21 Hallmark's view point. They're much more risk averse than
22 Clipper and the defendants are going to be in this negotiation.

23 The fourth point is no capital constraint.
24 Obviously, for a lump sum you have to be able to pay it. If
25 you can't pay it, it's not likely you're going to have a lump

1 sum payment if there is no money to pay it. So you have to be
2 able to. And in this situation I don't see that there would be
3 a capital constraint to pay the lump sum.

4 Q On that point, Dr. Serwin, are you saying that at the time
5 of this hypothetical negotiation, September 1, 2005, Clipper,
6 itself, could pay, or Clipper and Mr. Doctoroff, could pay
7 \$29.2 million?

8 A From what I've seen in this case it doesn't appear to me
9 that Clipper could not have obtained the money to pay the lump
10 sum.

11 Q Let's look at Exhibit 105, please.

12 Do you recognize Exhibit 105, Dr. Serwin?

13 A Yes.

14 Q Tell us what it is, please?

15 A This appears to be the first letter reflecting the first
16 bid of Clipper for RPG.

17 Q So this letter is, was written to William Blair which was
18 the investment bank trying to sell RPG?

19 A That's what I understand, correct.

20 Q And in July 2005, who is making the offer?

21 A Monitor Clipper.

22 Q Let's look at the signature line, please, Cindy.

23 And who signed the offer letter?

24 A That's William Young.

25 Q Managing director of Monitor Clipper Partners L.L.C.?

1 A Yes.

2 Q Any other parties to that, no CC, no other parties
3 addressed?

4 A Not that I see on the letter, no.

5 Q Let's go back a page, please.

6 Question of financing? Why is the financing
7 paragraph relevant to your belief that Clipper did not face a
8 capital constraint at the time of the negotiation?

9 A That according to this letter Clipper was representing
10 that they did not have any problem obtaining necessary
11 financing for a \$305 million payment for RPG. And so based on
12 that it doesn't seem that they would have a problem if they
13 needed to borrow and finance the \$29.2 million lump sum royalty
14 that they couldn't have obtained those funds.

15 Q Back to the first page, please.

16 Just looking for the 305. Where they offer
17 \$305 million in the first offering?

18 A I believe so.

19 Q Second page, please?

20 A Yes. The range of 290 to 305 million.

21 Q And that was in July of 2005?

22 A That's correct.

23 Q July 2005, there was obviously no deal to buy RPG, was
24 there?

25 A No, there was not.

1 Q No equity commitment from investors?

2 A Not that I'm aware of, no.

3 Q No binding contract commitment from lenders?

4 A Not that I'm aware of, no.

5 Q And RPG at that time was still independently owned by
6 Mr. Keiser and Mr. Friedman?

7 A That's what I understand, yes.

8 Q So at the time, July 2005, when Clipper and only Clipper
9 submits this proposal, it's the only party at the bargaining
10 table with Hallmark?

11 A Well, at the bargaining table in September 2005, but yes.

12 Q So. Let's go blank.

13 Let's start then in the hypothetical negotiation on
14 September 1, 2005 with the Clipper side of the table. Okay?

15 A Okay.

16 Q What are the relevant factors that Clipper, on its side of
17 the table, is going to consider in this negotiation?

18 A Clipper is going to consider the benefits that are going
19 to be received by virtue of being able to have and use the five
20 presentation trade secrets in the ownership and management of
21 RPG. That's the key thing and how that, those presentation
22 trade secrets are going to provide a benefit over and above any
23 other benefit associated with owning and operating RPG.

24 Q Now, Clipper, itself, is not going into the card business,
25 is it?

1 A No, it's not.

2 Q So what are the economic benefits that Clipper and only
3 Clipper takes into account at the bargaining table?

4 A At the bargaining table Clipper is taking account of all
5 of the benefits that are going to accrue from the ownership and
6 management of RPG utilizing the presentation trade secrets in
7 essentially the same way that Clipper is bargaining to purchase
8 RPG. It is taking into account all of the benefits of both
9 having RPG and the inherent organic benefits of RPG, a company
10 that is in business with greeting cards that has a certain
11 amount of sales and a certain amount of profit. And it is
12 putting in a bid to buy that at a total of, you know, hundreds
13 of millions of dollars and incorporated into that bid, the
14 benefit that it foresees will accrue to these presentation
15 trade secrets.

16 Q So just as Clipper, in offering a purchase price in July
17 of 290, \$305 million, considering all of the economic benefits
18 on the buy side, it would consider all of the economic benefits
19 on the licensing side as well?

20 A Yes. It's the same symmetrical relationship that when
21 Clipper is out there being the party that is negotiating to buy
22 RPG, it's considering all of the benefits in that price. And
23 when it's negotiating a license it would be considering the
24 same comparable, all the benefits from the intellectual
25 property.

1 MR. GERMAN: May we have Exhibit 108, please?

2 THE COURT: Mr. German, if you reach a breaking point
3 in the next 5 or 10 minutes, let me know.

4 MR. GERMAN: This is a good place.

5 THE COURT: All right. We're going to take our
6 morning break a little bit early. We'll see you back here in
7 about 15 minutes. Please keep an open mind until you've heard
8 all of the evidence. We'll be in recess.

9 (Witness temporarily excused.)

10 (The following proceedings were had OUT OF THE
11 PRESENCE AND HEARING OF THE JURY:)

12 THE COURT: One of our jurors was uncomfortable.
13 We'll see you in 15 minutes.

14 (The following proceedings were had OUT OF THE
15 PRESENCE AND HEARING OF THE JURY:)

16 THE COURT: So you won't be alarmed, Juror No. 4 is
17 going to move up to the front row because the glare is too
18 sharp. Juror No. 5 will move up to the front row. They'll be
19 in same order. She's just going to move away from the glare.
20 Okay, Eva.

21 (The following proceedings were had IN THE PRESENCE
22 AND HEARING OF THE JURY:)

23 THE COURT: Please be seated.

24 Mr. German, you may resume.

25 KENNETH SERWIN, RESUMED

1 CONTINUED DIRECT EXAMINATION

2 BY MR. GERMAN:

3 Q Dr. Serwin, we were just starting to talk about how in the
4 hypothetical negotiation on the Clipper side of the table the
5 total economic benefits would be evaluated. So what do you
6 assess that Clipper's point of view was for what it intended to
7 do if RPG could be acquired?

8 A My understanding from the documents is that the intention
9 was that RPG would be managed and operated for approximately 5
10 years and then a sale would be effectuated of RPG.

11 Q In that frame work then you have evaluated or tried to
12 quantify the benefits that Clipper would take into account two
13 ways?

14 A I have.

15 Q What are they, very generally?

16 A Very generally, there is one way is what is called an
17 analytical approach. What the analytical approach is, is
18 trying to look at, in this case, look at RPG and the value of
19 RPG without the benefit of the, all of the IP that Monitor
20 Clipper would have anticipated it could bring to the
21 transaction for RPG that others could not.

22 And then the other way is to do what is called a
23 discounted cash flow analysis which is actually to try to look
24 at what was the anticipated additional dollars that Clipper
25 would have anticipated would have resulted from employing the

1 intellectual property that it anticipated it could bring to RPG
2 and doing what we call bringing that back to present value so
3 you have monies that you would earn in the future and what are
4 those monies worth to you today. Because money today is worth
5 more than money in the future.

6 Q So let's go to slide 9, please.

7 Tell us, Dr. Serwin, what we're looking at on slide
8 9?

9 A This slide is reflecting that there were two rounds of
10 bidding for RPG. And this slide is looking at two of the
11 bidders, Monitor Clipper and Kelso. As I understand at the end
12 of the day in the second round bidding, those were the only two
13 bidders who actually bid for RPG. In the first round there
14 were more than just these two bidders but this is comparing
15 those two bidders in the first round and the second round and
16 showing the differential between the Monitor second round bid
17 and the Kelso second round bid of \$87 million.

18 THE COURT: Just a moment.

19 MR. MANCHEL: Objection, Your Honor.

20 THE COURT: Step up.

21 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
22 PROCEEDINGS WERE HAD:)

23 MR. MANCHEL: The hearsay issue, Your Honor, on the
24 two bids. He said he understands. There is no evidence in the
25 case that the only other bid in the second round was Kelso. He

1 can say that he knows Clipper has a bid and Kelso has a bid but
2 he's trying to create the impression from the bid that Kelso
3 was the next best bid or only other bid. There's no evidence
4 in the case.

5 MR. GERMAN: He's going to explain that. I'm really
6 surprised at this. Kelso is the only other bid. They
7 subpoenaed the documents from Blair. 30,000. We all got them.
8 We then looked at those documents and saw there were eight.
9 There were initially 15 in the first round. Eight were invited
10 to go to the Chicago meet --

11 THE COURT: Blair's records?

12 MR. GERMAN: Yes.

13 THE COURT: Says Kelso is the second bidder?

14 MR. GERMAN: Shows eight firms were invited to the
15 second round. We then contacted and subpoenaed the eight. And
16 once that had -- documents produced them to us, Kelso is the
17 only other bid. And he's got a schedule on that.

18 MR. MANCHEL: That's the issue. And we looked at
19 every single deposition where this has been raised we have
20 objected to it there is no surprise here. We objected each
21 time. If my memory serves me correctly, and I could be wrong,
22 there is actually a memorandum in one of the documents that
23 talks about the possibility of there being other bidders. It
24 is absolutely true Kelso was a second bidder. They can compare
25 the two bids. But what we object to is unduly prejudicial

1 based on hearsay is the notion it was the only other bid or
2 next best bid. There is no evidence in the case of that.

3 MR. GERMAN: There is evidence.

4 THE COURT: I'm going to allow it. Overruled.

5 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

6 BY MR. GERMAN:

7 Q Dr. Serwin, how do you know or on what do you base the
8 statement that you made that Kelso and Clipper were the only
9 two bidders in the final round?

10 A I have been provided a large amount of documentation that
11 I understand was produced in this matter from both William
12 Blair, the investment banker that handled the transaction for
13 RPG, related to the bidding for that. And I've also reviewed,
14 been provided and reviewed documentation with respect to a
15 number of parties that were invited to participate in the
16 second round bidding and I've looked at all of that
17 documentation. And what I found is the only second round bid
18 that was actually provided to William Blair in addition to the
19 Monitor Clipper bid was that of Kelso.

20 Q You prepared a schedule to that effect, sir?

21 A I believe so, yes.

22 Q I'll hand you Exhibit 547N. Ask you to please identify
23 547N for the Court and jury, please?

24 A Yeah. This is schedule E1 from my updated and revised
25 report.

1 Q What does it show?

2 A What this schedule has is from --

3 Q Don't give us the contents. Just tell us.

4 A This shows who the first round bidders were and what their
5 bids were and the second round bidders.

6 Q And is this the documentation on which you have based your
7 testimony we see on slide 9?

8 A Yes.

9 MR. GERMAN: Your Honor, offer Exhibit 547N.

10 THE COURT: Defendant objected to 547N. It will be
11 admitted over defendant's objection.

12 BY MR. GERMAN:

13 Q We don't need the footnotes but blow up the top, please.
14 Thank you.

15 All right. So here is the initial bid and final bid.
16 Explain to us what we're seeing there?

17 A Yes. In the left-hand side are all of the initial bids.
18 These are the parties from the documentation that I reviewed
19 that provided initial bids. And then on the right-hand side
20 are three parties. There is Monitor Clipper that actually
21 provided a second round bid of \$305 million. There is Kelso,
22 who actually provided a second round bid of \$218 million. Then
23 additionally there was a third party, Fremont Alaira, that from
24 the documentation I reviewed said that they were prepared to
25 provide a second round bid of between 215 and 220 but did not,

1 in fact, provide that bid.

2 Q And the initial bids, that Exhibit 105 that we looked at a
3 moment ago, the initial Clipper letter 290 to 305 or 280 to
4 305?

5 A Yes.

6 Q That was in July?

7 A That's correct.

8 Q And the second round bids were when?

9 A In September.

10 Q In September?

11 A Yes.

12 Q And the hypothetical negotiation is then between those two
13 on September 1?

14 A Yes, it is.

15 Q Let's look at slide 10.

16 Explain to the Court and jury, Dr. Serwin, what we
17 see on slide 10. You mentioned earlier the analytical method.
18 Explain your methodology?

19 A That's correct. This is a graphical representation, the
20 analytical method. By way of example think about the
21 following. Suppose that you are going and you're buying a car.
22 And there is one car that has a navigation system. And
23 otherwise it's whatever model car and it's got the same trim
24 levels of leather, whatever kind of stereo system, etc. And
25 let's say, you know, the price of that car is \$24,000. And you

1 want to know how much of that \$24,000 you're paying for the
2 navigation system. Let's just say you don't have the invoice
3 in front of you that actually lays out that. You want to know.
4 But what you do know is that there is another car right next to
5 it, exactly the same. It's the same color, same model, same
6 year, same leather, doesn't have a navigation. It cost 20,000.
7 How much do you think you're paying for the navigation system?
8 You're paying the \$4,000 difference. That's the one item
9 that's different between them.

10 That is the logical frame work we're working with
11 here. That Kelso is a private equity firm that is viewing as a
12 market basis and made a bonafied offer for RPG based on what it
13 was able to acquire. RPG, the organic company with its
14 business and the profits that its business was going to
15 generate under the management of Kelso private equity firm.
16 They bid \$218 million. So taking that as the value of RPG
17 without the extra IP that Clipper believed it could bring to
18 RPG, Clipper bid \$305 million. It was buying the same exact
19 thing that Kelso was buying for 218 and it had this extra,
20 anticipated having this extra intellectual property that it
21 could put to this and the returns that it would get from having
22 that extra intellectual property. And it bid 305. The
23 difference, the \$87 million, is the value of that extra
24 information.

25 Q Are you saying, Dr. Serwin, that the \$87 million

1 difference between these two bids is attributable to the five
2 presentations?

3 A No, I'm not.

4 Q Are you saying that's some portion of the 87 million?

5 A Some portion of the 87 million is attributable to the five
6 presentations. Because the \$87 million reflects everything
7 that Monitor Clipper thought at the time that it would be able
8 to bring to RPG that is over and above what Kelso would have
9 thought it could bring.

10 Now, if you remember back to that first slide with
11 the big black circle and the small circle with the five
12 presentations in it. At the time Clipper, it's reasonable to
13 anticipate they would have thought we're going to get
14 everything we need from Monitor Consultants. That's our
15 approach. That's our investment strategy. We leverage off
16 what Monitor Consulting could bring. Monitor Consulting did
17 this big project with Hallmark. We anticipate we'll get
18 everything and we'll be able to get the value of everything.

19 Now, what, what I valued is just the five
20 presentations which as I said is a subset of what the totality
21 of what it might have anticipated bringing. And so the
22 \$87 million is going to be inclusive of everything it would
23 have anticipated, not just the five presentations.

24 Q I'm sorry to interrupt. But how do you know or --

25 THE COURT: Mr. German, just a moment.

1 MR. MANCHEL: May we approach?

2 THE COURT: Yes.

3 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
4 PROCEEDINGS WERE HAD:)

5 MR. MANCHEL: Move to strike the last answer. He
6 just suggested to the jury Clipper anticipated getting all of
7 the trade secrets generated by Hallmark. The first slide
8 Clipper anticipated getting all of it, everything. He referred
9 specifically back to that first slide that showed only the
10 presentations at issue in this case. And then all the other
11 presentations that supposedly have been done in the case. His
12 testimony in front of the jury he believed Clipper anticipated
13 getting all of those terms but he's only seeking damages for
14 this. I move to strike. It's beyond his expertise. It has no
15 relevance to the case. It's unduly prejudicial. And he's not
16 here to testify on that.

17 MR. GERMAN: I think he was overstating.

18 THE COURT: All right. I'll sustain the objection.
19 I'll tell the jury to disregard.

20 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

21 THE COURT: Ladies and gentlemen, I've sustained the
22 defendant's objection to the witness's statement that Monitor
23 Clipper anticipated getting all of Hallmark's trade secrets and
24 you're instructed to disregard that testimony.

25 BY MR. GERMAN:

1 Q Dr. Serwin, on what do you base your conclusion that some
2 portion of the \$87 million bid differential is attributable to
3 the five presentations?

4 A The conceptual frame work under which I approached this
5 was to look at the position that Monitor Clipper as a
6 negotiating party would have been in at the hypothetical
7 negotiation. And at the hypothetical -- or I'm sorry. Let me
8 take that back. This is the, the situation when they bid for
9 RPG, and when they bid for RPG they anticipated or would likely
10 have anticipated having more than they had in their hands. And
11 that the totality of their bid is reflective of the totality of
12 everything they may have anticipated.

13 Q And what do you base that on, that observation?

14 A Well, I base that on the documents of Monitor Clipper
15 reflecting why they bid what they bid for RPG.

16 Q Let's go to the next slide, please.

17 This was admitted previously in the case, Exhibit 55.
18 Is this one of the documents?

19 A Yes, it is.

20 Q And what do you infer from Exhibit 55.

21 A What I infer from Exhibit 55 is why Monitor Clipper was
22 willing to pay more than Kelso was willing to pay. The
23 statement that they, Monitor Clipper, believe that their
24 consulting arm has unparalleled experience, the consulting arm
25 being Monitor Consulting, in the greeting card industry

1 including work they have done for Hallmark. So that is
2 everything they have done for Hallmark. That because of that
3 they, Monitor Clipper, can derive growth and produce higher
4 cash flow from RPG than others. The others being the other
5 private equity firms that bid for RPG. Therefore, this
6 statement of why they bid what they bid wasn't based simply on
7 five presentations. This was based on Monitor Consulting's
8 totality of experience in the greeting card industry from the
9 totality of the work they did for Hallmark.

10 Q And you accept the notion, I take it, that Monitor
11 Consulting, so long as it's not using Hallmark information can
12 consult with Monitor Clipper?

13 A As long as it's not using anything that is proprietary to
14 Hallmark it's not illegal to use, yes.

15 Q Let's look at the next slide, please.

16 This was admitted previously as Exhibit 112 from
17 Mr. Yoon at Clipper. What do you infer for your damages
18 analysis from Exhibit 112?

19 A This is, again, reflective of this bid that they're making
20 isn't a bid that is only incorporating five presentation trade
21 secrets. This bid is incorporating the fact that Monitor
22 Clipper would have anticipated having all of the benefit of all
23 of the work that Monitor Consulting did for Hallmark. And
24 that's more than just the five presentations and that's why.

25 Q Okay. Let's go to --

1 THE COURT: Just a moment.

2 MR. MANCHEL: Same objection, Your Honor.

3 THE COURT: Well, the exhibit says what it says.
4 I'll allow it.

5 MR. MANCHEL: I object, Your Honor, to the witness's
6 characterization of the exhibits and what they mean.

7 THE COURT: The jury will disregard the witness's
8 characterization of it but the exhibit stands for itself.

9 BY MR. GERMAN:

10 Q My question, Dr. Serwin, is not asking you to interpret
11 the exhibit. What did you take from the exhibit and include in
12 your analysis?

13 A In my analysis I took from the exhibit that the
14 \$87 million was the value of more than just the five
15 presentation trade secrets.

16 Q Let's go to the next slide, please. Let's go to the next
17 one. Okay.

18 Now explain to the Court and jury what we see here as
19 you start to separate the bid differential, separate the five
20 presentations out of that \$87 million?

21 A Yes. The first thing is that Monitor Consulting is a
22 renowned international consulting firm that has inherent
23 intellectual property and competencies that could be brought to
24 bear separable and apart from what they know about Hallmark.
25 In fact, Hallmark, in the greetings card industry, hired

1 Monitor Consulting to bring to bear those competencies and that
2 intellectual property that Monitor Consulting had separate and
3 apart from the greetings industry. As I understand it before
4 Monitor Consulting did the work for Hallmark, they hadn't
5 worked in the greetings industry. So clearly they had
6 something that could be brought to bear to the greetings
7 industry. And it had value to a greetings card company.

8 Now they're going to be bringing that to bear,
9 Monitor Clipper is owning and operating RPG and they have their
10 relationship with Monitor Consulting, that likely will be
11 brought to bear and it's the value of that intellectual
12 property and competencies separate and apart from what they
13 knew about Hallmark that needs to be separated from the
14 \$87 million because that would be incorporated in the
15 \$87 million. And I estimated the value of that Monitor IP is
16 labeled there, \$11.7 million. So first we take that off.

17 Q And that is, what you're saying is there could be Monitor
18 value brought to the Clipper side of the negotiation, the same
19 kind of value that Hallmark paid \$12 million for for the BMR?

20 A That's correct.

21 Q Let's go to the next slide.

22 So if you take off from the 87 million the
23 \$11.7 million that you attributed to the appropriate Monitor
24 Consulting relationship, what is the next step in breaking that
25 \$87 million down?

1 A Okay. Well, then we've got about \$75 million after we
2 take the 11.7 million off. Now, the five presentations were
3 only part of the BMR project. And Monitor Clipper knew that
4 Hallmark had the entire BMR project. So we need to separate
5 out any potential value from the rest of the project from the
6 five presentations that are being valued. And I allocated the
7 value of the presentation trade secrets out of the total by
8 taking the dollar amounts of consulting fees that were for the
9 greetings and channel project, relative to all of the BMR fees.
10 So 5 million divided by 12 million is 41.5 percent. So I
11 estimated that the presentation trade secrets are 41.5 percent
12 of the amount after the Monitor IP was taken off.

13 Q Okay. Next slide, please.

14 Then you conclude what?

15 A Then I conclude from this method of looking at the
16 benefits that what Clipper would have been taking into account
17 at the negotiating table is expected benefits of
18 \$31.25 million.

19 Q Now, you told us that in addition to this bid differential
20 analytic method that you've just taken us through, you also did
21 what you referred to as discounted cash flow analysis?

22 A That's correct.

23 Q And we're still talking about Clipper on its side of the
24 hypothetical negotiating table thinking of the benefits that it
25 can derive in the negotiation?

1 A That's correct.

2 Q So let's go to the next line. Tell us what we see here?

3 A Well, when you're doing an evaluation of anything you try
4 and look at the different approaches if it's possible, if you
5 have the information available to you to do different
6 evaluations. Another common method to evaluating intellectual
7 property, if you have information available to you, is, well,
8 how much profit is expected to be derived from the intellectual
9 property over a period of time and discount that back to
10 present day and how much in a lump sum is that worth.

11 So what I did was I looked and said is there anything
12 in the record in this matter that would indicate to me the
13 beliefs of Monitor Clipper at the time of the hypothetical
14 negotiation that would enable me to do a discounted cash flow
15 method, enable me to actually look at dollars and profits and
16 discount from that. And based on my review of the
17 documentation in the case I found that it was possible to do so
18 because there was indications that Clipper expected that they
19 would be able to double the market share of RPG as a result of
20 the value that was being brought by this unique IP.

21 Q So what are, explain to the Court and jury what are the
22 numbers we see on your slide 17?

23 A Sure. So if you look at the first five bars that add up
24 to \$91.5 million or arrive at 91.5, at the time that Monitor
25 Clipper was looking at RPG, the bid time, the revenue of RPG

1 was \$91.5 million. So to double that revenue would be doubling
2 another 91.5 million on top of whatever they're going to get.

3 Now I did not assume that they would double it
4 immediately, the day they acquire it all of a sudden it is
5 \$83,000,000 -- \$183,000,000 revenue. I assume that that
6 additional amount over and above what RPG is expected to earn
7 by what Kelso expected them to generate will gradually increase
8 by years. So I took the 91.5 and divided it by 5. So in the
9 first year the additional amount of revenue would be
10 \$18.3 million. In the second year the additional amount of
11 revenue would be 36.6 and so on for the five years until in the
12 fifth year the additional amount of revenue that would be
13 derived from all of the unique IP that Clipper could bring
14 would be 91.5.

15 What I then did, those are revenue bars. Then what I
16 did was say, well, how much profit would be derived from that
17 additional revenue? So in the first year how much profit from
18 18.3 million additional revenue? In the second year how much
19 profit from the 36.6 million additional revenue? And so each
20 of those first five bars were then converted to a profit. And
21 so that's the first five years of additional profit.

22 Additionally, at the end in the fifth year when
23 Clipper intended that RPG would be sold, RPG would be sold and
24 it would be a firm that would have \$91 million a year and the
25 associated profit with that, additional, over and above what

1 others would expect. And so what a discount cash flow does is
2 say what is the value of that? How much more would they be
3 able to sell RPG for? Then what would be expected Kelso would
4 be able to sell it for? And that would be 145,800,000 more.

5 So then we take that, and to be clear that profit
6 that's the additional profit that they would get. And then we
7 take that and we take the profit from those first five bars and
8 we bring all of that back to present day and that's the
9 additional value at the time of the negotiation that Clipper
10 would have anticipated for the unique IP that it would bring.

11 Q Dr. Serwin, here's what we have marked as 547L. Ask you
12 to, please, explain to the Court and jury what we see in this
13 exhibit?

14 A This exhibit has the two different approaches at arriving
15 at the expected benefit from the unique IP that Monitor Clipper
16 would have anticipated could bring to RPG under the two
17 different methods.

18 Q This is the actual quantification of the two approaches
19 you just described?

20 A That's correct.

21 MR. GERMAN: Your Honor, we offer 547L, please.

22 MR. MANCHEL: One moment please.

23 Your Honor, we object.

24 THE COURT: 547L will be admitted over defendant's
25 objection.

1 MR. MANCHEL: May I state the basis for the objection
2 on the record? Objection is hearsay.

3 MR. GERMAN: Your Honor, is that overruled?

4 THE COURT: Yes.

5 BY MR. GERMAN:

6 Q Let's, please, display 547L. Again, we don't need the
7 footnotes but just give us the top half.

8 So, Dr. Serwin, we were just looking at the bar
9 graphs of the five year revenues starting at \$18 million
10 increase over the base, culminating in a doubling of revenues
11 in year 5.

12 A That's correct.

13 Q Then you describe the sale price where \$145 million of
14 additional sale price attributable to those revenues is
15 calculated into the factors Clipper would be considering in the
16 negotiation?

17 A That's correct.

18 Q And when you bring that back to present value, what,
19 explain how that works to get this \$82 million number we're
20 looking at?

21 A Well, you take the additional profit that will be in each
22 of these years in the future and you bring that back. That's
23 what is called a discount rate to the present time. And
24 bringing that back to the present arrives at a value of
25 \$82 million.

1 Q So you're adding, after you apply these discount factors,
2 you add them up to become \$82 million?

3 A That's correct.

4 Q And in the prior method the differential method that
5 \$82 million number compares to the \$87 million number, is that
6 correct?

7 A That's correct.

8 Q On both you have subtracted \$11.7 million of what you call
9 Monitor IP?

10 A That's correct. And what this particular schedule stops
11 at subtracting 11.7 from both of them. The next step is to
12 then apportion these total to the five presentations by the
13 41.5 percent.

14 Q Let's pause there for just a moment. Explain to us, you
15 said that the expectation was that RPG would be sold again at
16 the end of five years. What do you base that on?

17 A Based on the representations that I've seen in the record
18 of the desires and expectations of Clipper to exit from the
19 transaction by selling RPG within five years.

20 Q Selling to whom?

21 A Selling to a strategic buyer in the market.

22 Q And what does that mean? Strategic buyer?

23 A A strategic buyer is an entity that is not necessarily
24 just buying the dollars of profit that this particular or any
25 particular purchase would provide for. But it's also taking

1 for damages for that. And that's what you ruled.

2 Now, here we're talking about hypothetical
3 negotiation. And it's a frozen point in time, September 1,
4 2005. What do the parties do at that time?

5 THE COURT: Don't hit the bench.

6 MR. GERMAN: What do the parties at that time have in
7 their mind to try to hammer out this license? And at that time
8 just like they thought RPG was going to be a success and it
9 wasn't. At that time Hallmark would have believed that they
10 were successful, we would not be. And that's the dynamic back
11 and forth in the license. It's not a lost profits claim for
12 him to now say but that didn't happen. That's looking, that's
13 the Monday morning quarterback looking back. Didn't happen.
14 But at the time of the negotiation setting the price, that's
15 what they would have expected.

16 MR. MANCHEL: I think it goes to credibility. He's
17 not saying Hallmark expected that. I'm saying I believe
18 Hallmark would expect that I want to say how could Hallmark
19 have expected that do you know for a fact, sir, there are no
20 actual losses from the use? Your expectation, the center piece
21 of your expected losses is not reliable for the jury.

22 THE COURT: I think the problem with your argument,
23 Steven, this is a hypothetical negotiation. It assumes a lot
24 of things that didn't turn out to be true including the fact
25 RPG was going to be successful and it wasn't. I think that

1 it's okay for him to make that assumption at the time of the
2 hypothetical negotiation. What happened afterward doesn't make
3 any difference as to the negotiations itself. So I'm going to
4 deny the objection.

5 MR. MANCHEL: Can I, one other issue, under that
6 logic then going back to this nxtMove document from 2006 which
7 is the doubling document we've objected to under that same
8 logic, they ought to be able to say that in 2005 something that
9 occurred in 2006 is part of what the expectation would be. I
10 mean, I'm willing to --

11 THE COURT: What is the date of the double document?

12 MR. GERMAN: 2006.

13 MR. MANCHEL: I think it's November, full year beyond
14 their hypothetical negotiation that's the basis for their
15 doubling argument.

16 MR. GERMAN: Not the only basis.

17 MR. MANCHEL: I'll demonstrate on cross in his report
18 and at his deposition that is the only basis offered. But my
19 point is so I don't have to come back, I'll do it on cross but
20 my only point is if that's the line and I don't want to have to
21 keep coming back up, that's the line, I'm okay with it. But I
22 ask it apply to, you know, quote, unquote, our expectations as
23 well.

24 THE COURT: What other evidence of the doubling is
25 there, Charlie?

1 MR. GERMAN: Charles Yoon testified he believed they
2 would be able to double revenues and there are several
3 documents that speak of a market share movement from 1 to
4 2 percent or 2 to 4 percent, 5 or 6 of them. Dr. Serwin was
5 asked in his deposition, challenged in his deposition, show me
6 the document. And he did.

7 THE COURT: All right. If that objection were made I
8 would overrule it and allow you to cross-examine.

9 Oh, step up. As you folks have sensed from the
10 pattern of my rulings I'm going to allow pretty broad
11 cross-examination of both experts in this case.

12 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

13 BY MR. GERMAN:

14 Q Dr. Serwin, I'm going to hand you now Exhibit 547K. And
15 please explain to the Court and jury what you see here?

16 A This is Schedule D2 to my updated revised report and this
17 reflects the mechanics of the calculation that arrived at the
18 \$67 million.

19 MR. GERMAN: Your Honor, move 547K.

20 THE COURT: Over defendant's objection, 547K is
21 admitted.

22 BY MR. GERMAN:

23 Q Okay. In the black space you see the \$67 million,
24 correct?

25 A That's correct.

1 that on the Hallmark side of the hypothetical negotiation that
2 would be of concern to the Hallmark negotiators?

3 A Yeah. The \$67 million is a question of actually
4 quantifying an expected amount, as I said expected amount of
5 lost profit from the actual gain that RPG would have been
6 anticipated to make.

7 Now, these trade secrets would enable or could
8 possibly enable RPG to go out to Hallmark customers and compete
9 for those customers. In the case where they win those
10 customers, those are the increased sales and the anticipated
11 losses from Hallmark. But there would likely be situations
12 where providing that information and competing, say for CVS
13 Pharmacies, that RPG wouldn't win but CVS would get on the
14 phone to Hallmark and say, hey, we need a better deal than
15 we're getting. We're getting strong competition and they're
16 telling us that, you know, you're overcharging us. And in
17 those circumstances it's likely that in some of those sales
18 Hallmark would maintain so RPG wouldn't get sales. Hallmark
19 wouldn't have losses directly attributable to those sales which
20 were calculated in 67 but Hallmark would likely anticipate,
21 well, we're going to have to lower our prices to that customer
22 and so we'll lose other profit that way. That's not
23 incorporated in the \$67 million but that would be incorporated
24 in Hallmark's mind.

25 Q Let's go to slide 19, please.

1 So, Dr. Serwin, you have taken us to both sides of
2 the negotiating table, the Clipper side and its economic
3 expectations and the Hallmark side and its expectations. Tell
4 us what we see on slide 19.

5 A So on slide 19 you have the two left-hand balloons there,
6 the expected benefit balloons from the bid differential and the
7 RPG growth and sale approach are the 87 and the 82 from the
8 Clipper side of the table that we talked about. And on the far
9 side is that quantification of anticipated lost profit on the
10 Hallmark side and where I've determined the reasonable royalty
11 would be based on the \$82 million benefit that Clipper would
12 have anticipated that the trade secrets would or that all of
13 the unique IP would benefit and then break that down to the
14 five presentations.

15 Q If you had done the same computation taking off the
16 Monitor IP and then allocating down to the five presentations,
17 over in this column under the bid differential approach, well,
18 did you do that computation?

19 A That computation we saw in the earlier slide. That was
20 31.25 million.

21 Q And between the 31 and the 29.2 why did you select the
22 29.2?

23 A I selected the 29.2 because it would be the more
24 conservative number.

25 Q Go to the next slide, please.

1 A On the second approach it's a calculation of the profit,
2 yes.

3 Q You were very, very careful though not to say who expected
4 the profit, isn't that right? You didn't name anybody, did
5 you, sir?

6 A I'm not sure I understand your question.

7 Q When you said that the profit would be expected, you
8 identified the profit that would be expected, you did not say,
9 as best I can recall, that that expectation would be that
10 Clipper would get the profit, isn't that right?

11 A What I said was that at the negotiating table Clipper
12 would be negotiating with Hallmark and the result of that
13 negotiation would be a royalty that took into account that
14 expected profit.

15 Q Sir, do you think that Clipper, Clipper paid \$29 million
16 out of its own pocket, do you think on September 1, Clipper
17 would have an expectation of making profit on that money?

18 A I didn't do a calculation that related to who exactly was
19 going to, at the end of the day who would have the empty
20 pocket.

21 Q Let's be clear about this so the jury can take this in
22 steps. No. 1, you never concluded, you've never told this jury
23 that Clipper would have expected a profit if Clipper had to pay
24 \$29 million, isn't that right?

25 A That's correct.

1 Q No. 2, you actually did identify in your report and at
2 your deposition you identified who would expect a profit if
3 they were forced to pay \$29 million, didn't you, sir?

4 A I'm not sure exactly that those two things were combined.

5 Q Sir, your \$29 million figure was used in your second
6 report and at your deposition, right?

7 A The 29.2 million is the result of the negotiation between
8 Clipper and Hallmark.

9 Q Sir, I'm asking you, I know that's what you say. I'm
10 asking you because I think you brought other people to the
11 party. So I'm asking you a question about expected profits.
12 You just represented to this jury that the deal can't happen
13 unless the party to the license expects a profit, right?

14 A What I said was that at that negotiation Clipper would be
15 the negotiating party and Clipper would negotiate a royalty
16 that is based on the totality of the benefits.

17 Q Well, let's be clear, sir, because there's a lot of money
18 at stake. Clipper is not negotiating. Clipper is the party,
19 correct?

20 A Clipper is the negotiating party.

21 Q Clipper is the party to the contract. This jury may not
22 assume that anybody else is party to these negotiations, isn't
23 that right?

24 A In the same way that Clipper was negotiating the purchase
25 of RPG, the \$305 million that it bid in the second letter and

1 the \$317 million that was ultimately paid, Clipper negotiated
2 that. And Clipper would also have negotiated the royalty in
3 the same symmetrical relationship.

4 Q So your theory, sir, is the numbers on which your theory
5 is based is Clipper sits at the table negotiating for others,
6 right?

7 A I don't know. I don't have an opinion on that.

8 Q Now, which is it? Are they the party to the license or
9 are they negotiating?

10 A They would be the party to the license.

11 Q So let's go back to my first question. They're the party
12 to the license. No one else, right?

13 A The defendants in the case are the parties to the license.

14 Q Mr. Doctoroff is a party to the license?

15 A Yes.

16 Q Do you conceive of a scenario under which Adam Doctoroff
17 could pay \$29 million and make a profit?

18 A Monitor Clipper was a party to the license. What I have
19 seen is that Monitor Clipper had access to capital and could
20 pay the \$29.2 million.

21 Q Sir, I know you want to jump around to these different
22 issues. I'm just asking about profit. I'll get to your --

23 MR. GERMAN: I object to the argument in the
24 question. I know it's cross-examination but.

25 THE COURT: I'm going to, as I've indicated to you,

1 I'm going to allow broad cross-examination but, please, don't
2 argue with the witness.

3 MR. MANCHEL: Thank you, Your Honor.

4 BY MR. MANCHEL:

5 Q I'll get to the capital constraint. I promise. Right now
6 I'm talking about your conclusion of expected profit. Let's
7 establish for the jury, I think we just did, the only party to
8 this license on this side is Clipper and, in your view, Adam
9 Doctoroff, correct?

10 A That's correct.

11 Q Can you tell me, strike that. When you were deposed you
12 said, just as you did today, that 29.2 million was the right
13 price, correct?

14 A That's correct.

15 Q And you said that the reason 29.2 million was the right
16 price was because the beneficial owners of the income stream
17 would pay that amount of money, isn't that right?

18 A I said that the profit stream would accrue to the owners
19 of that profit stream.

20 Q Sir, you said the beneficial owners would pay the
21 29.2 million, didn't you, sir?

22 A I don't recall whether I used those exact words or not.

23 Q Go to the Serwin deposition, please. Would you go to,
24 looks like to page 258, line 10. Blow up lines 10 through
25 looks like 25. Go one more page, Jeff. It's line 29, page

1 258, line 29. The bottom of this page right here.

2 Well, now, sir, to be clear, regardless of the entity
3 that generates the revenue, the owners of the profit stream
4 that would be derived from that -- go to the next page.
5 Derived from the revenue are the parties who would be paying
6 the royalty. Do you see that?

7 A I do.

8 Q That's what you said at your deposition, right?

9 A That is in response to that question there.

10 Q Well, sir, did you say that the parties who get the
11 revenue would be the parties that pay the price? That's your
12 testimony, right?

13 A That was the testimony in response to your question there,
14 yes.

15 Q Let me ask you a question now here. Isn't it true, sir,
16 that under your theory the party that would pay the
17 29.2 million are the parties that would get the revenue and
18 profits?

19 A That is what my response was there, yes.

20 Q I'm asking you now. Now that you've seen your response,
21 let's forget that question for a second. I'm asking the
22 question. Isn't it true, sir, that your \$29.2 million number
23 is based on the assumption that the parties who get the profit
24 stream and the revenue stream would pay the 29.2 million?

25 A That may be the ultimate resolution.

1 Q Is that a yes, sir?

2 A That is what I said in my deposition.

3 Q And you're saying it again now?

4 A That's what I said in my deposition so I'm not changing my
5 testimony.

6 Q So the answer is yes?

7 A Yes.

8 Q Okay. Now, Clipper is not one of the parties that gets
9 any of the revenue or profit, isn't that right?

10 A I don't know that that's true.

11 Q Sir, when a greeting card is sold, when the revenue comes
12 in from the sale of an RPG card, who gets the sale money?

13 A That's, the sale of the card is RPG. What I said there is
14 the owners of the profit stream.

15 Q I'll get there, sir, I promise. My question to you was
16 when RPG sells cards, RPG gets that revenue, right?

17 A When RPG sells cards, RPG gets that revenue.

18 Q And you know Clipper doesn't get that revenue, right?
19 Just RPG, right?

20 A RPG gets that.

21 Q Under your theory RPG would somehow use these trade
22 secrets and become so profitable that it would be sold for a
23 lot of money at some point, right?

24 A The theory is that at the hypothetical negotiation at
25 which Clipper is negotiating a license with Hallmark that this

1 would be anticipated by both parties to the negotiation and
2 that the royalty that would result from that negotiation would
3 be based on those anticipations.

4 Q My question to you, sir, is according to you, the two
5 people sitting at the table, Hallmark and Clipper and Adam
6 Doctoroff would expect that RPG would do really, really well
7 and sales revenues would go up and up and up and RPG would be
8 sold in five years for a lot more money than it was purchased
9 for, right? That's the assumption?

10 A Yes.

11 Q Okay. You then have to assume that Clipper thinks in that
12 scenario Clipper is going to make a profit, right?

13 A What I would assume is that Clipper is negotiating and
14 they are the party negotiating this royalty and that the result
15 of that negotiation is going to be this royalty.

16 Q Okay. Now, we're back to Clipper as the negotiator, sir.
17 I'm asking about Clipper as the party to the license?

18 A Clipper is also the party to the license. There was no
19 one else at the time of this negotiation. There was Clipper.
20 There was no other entity because there had been no
21 transaction.

22 Q Well, there was Fund II, right? Fund II existed?

23 A Fund II existed. I don't know that there was any
24 commitments or responsibilities of Fund II with respect to this
25 at the time of the negotiation prior to the transaction

1 purchase of RPG.

2 Q Sir, you know full well that Fund II is the 80 percent
3 owner of RPG, isn't that right? You know that, right?

4 A After the transaction took place that is who the ultimate
5 owner was.

6 Q And you know that on day one the assumption that Clipper
7 would have had sitting at the table is that Fund II was going
8 to be the one buying RPG, isn't that right?

9 A At the table Clipper is doing the negotiating.

10 Q I understand Clipper is doing the negotiating, sir. My
11 question to you is when Clipper is sitting at the table doing
12 the negotiation, Clipper's expectation is Fund II would be
13 doing the buying, correct?

14 A I'm not in their head.

15 Q Well, you know Fund II bought it. You know Fund II had an
16 \$800 million fund, right?

17 A Yes.

18 Q And you know that Fund II is the one that went out and
19 paid the hundred million dollars and you know that Fund II is
20 the one that went out and got the financing for \$200 million,
21 right?

22 A The latter part, I'm not sure who got the financing.

23 Q So you think Clipper is sitting on September 1 not knowing
24 any of that? Not having those expectations?

25 A It's reasonable to suggest that they would have had those

1 expectations.

2 Q Correct. And Clipper also knows that in your scenario
3 when these trade secrets are supposedly used and the revenue
4 goes up and the price goes up in 5 years, that when that is
5 sold in this hypothetical world, when that sold the money goes
6 to Fund II, what percentage of Fund II is Clipper, sir?

7 A I know they were a small percentage.

8 Q If I suggest to you that even if we use the \$29 million
9 price, if Clipper is sitting there at that moment, what is
10 Clipper's percentage? It's under 2 percent, isn't it, sir?

11 A I believe that Clipper's ultimate ownership of Fund II is
12 under 2 percent.

13 Q And Clipper's ultimate indirect ownership of RPG was what,
14 sir? Do you remember?

15 A I don't.

16 Q It's 1.4 percent, isn't that right?

17 A I remember that percentage.

18 Q What is 1.4 percent, sir, of \$29.2 million?

19 A I don't have a calculator with me.

20 Q If I suggest to you that it's \$406,000 would that sound
21 about right?

22 A That's probably correct.

23 Q So sitting at the table for itself and apparently
24 negotiating for others for this hypothetical license, the
25 expectation of Clipper would have been that if 29 million is,

1 in fact, the right price, its piece, its price would be
2 1.4 percent of that or \$406,000, right?

3 A I don't know that that would be what they were thinking.

4 Q Well, in fact, sir, the only thing you know is that the
5 29.2 million would be paid by other people who are not in this
6 case, isn't that right?

7 A I didn't do a determination of who would be the ultimate
8 pockets that that would come out of.

9 Q Well, you don't have to do a determination, sir. The
10 beneficial owners of the profit and the revenue do not include
11 Clipper, isn't that right? You used the word beneficial
12 owners. Doesn't include Clipper, does it?

13 A I think you just said that they're incorporated in there
14 by their ownership.

15 Q Well, they're incorporated as a limited partner of that
16 giant fund, right?

17 A I think all of the legal arrangements and contractual
18 arrangements between all of the various lettered parties in
19 this are outside of the scope of my analysis.

20 Q Well, no, sir, they weren't outside of the scope of your
21 analysis. You were given instructions by Hallmark's counsel
22 what to do about all of this, weren't you?

23 A The scope of my expertise is not with respect to the legal
24 structure of private equity or their various holdings and
25 investment companies and funds and etc. and I did not make any

1 opinion one way or the other on that.

2 Q Sir, you're a PhD in economics from UCLA. Are you telling
3 this jury that you couldn't figure out precisely what Clipper
4 owned indirectly of RPG? You could figure that out, right?

5 A I didn't say that. I said that understanding this complex
6 legal structure is something that is not what an economist does
7 and I didn't do that. I asked counsel for instruction on that.

8 Q Well, again, I like to be clear because there is a lot at
9 stake here. You could have figured out the 1.4 percent, isn't
10 that right? I mean, I figured it out. I'm not a PhD. You
11 could have figured it out, right.

12 MR. GERMAN: I object to that question.

13 THE COURT: Sustained.

14 BY MR. MANCHEL:

15 Q You could have figured out the 1.4 percent, couldn't you?

16 A I don't know if I could have or not. I didn't do that
17 analysis.

18 Q All you had to do is figure out how many limited partners
19 there are in Fund II. How much Fund II has. And how much
20 Clipper put in, right? That would tell you exactly what their
21 interest is.

22 A I don't know. You represented a way to calculate it. I
23 didn't do that analysis.

24 Q I know you didn't do it. I'm agreeing with you. My
25 question is you could have, right?

1 A I don't know that I could have or not. I didn't do it.

2 Q The reason you didn't do it is because Hallmark's lawyers
3 told you not to do it. Isn't that right?

4 A No, that's not right.

5 Q Well, what Hallmark lawyers told you was, we're going to
6 see this all throughout your testimony as I walk you through my
7 prepared statements. What Hallmark's lawyers told you to do
8 was every single time, every time that there was any question
9 of money and who owed what money, you were to assume that
10 Clipper was liable for it even though others got it, isn't that
11 right?

12 A I was working under the assumption that Clipper was liable
13 for the damages in this case.

14 Q Well, specifically, sir, they told you, the Hallmark
15 lawyers told you that when you get up and testify you are to
16 make no difference between Fund II, RPG, RPGI, RPGI Holding.
17 They're one in the same, right?

18 A I don't agree with your characterization of telling me how
19 to testify. They didn't tell me how to testify.

20 Q Do you think -- I'm sorry?

21 A I was, my analyses were performed in a way that did not
22 take a distinction and make a distinction between those various
23 parties in the analyses.

24 Q Your analyses were formed without making a distinction
25 between, that's because the Hallmark lawyers told you to do

1 that, correct?

2 A What I asked was whether or not my analyses should be
3 performed on the basis of drawing such a distinction. I was
4 told my analyses shouldn't.

5 Q Sir, you didn't ask. You know, let's be simple about
6 this. You know that Fund II, the companies that make up Fund
7 II are legally different from Clipper, right? You know that?

8 A That's a legal distinction which is outside of the scope
9 of my expertise.

10 Q Sir, I asked you a question at your deposition. We'll get
11 to it this afternoon if we have to. I asked you, do you
12 understand that Fund II is legally distinct from Clipper? And
13 you said yes.

14 A Yes, it's legally distinct from Clipper.

15 Q So it's not a legal -- you know that, right?

16 A It's its own legal entity.

17 Q It's its own legal entity. And you know the same is true
18 for RPG, right? RPG is not Clipper. It's a separate legal
19 entity, right?

20 A Yes.

21 Q You know the same is true for RPGI and RPG Holdings,
22 right?

23 A I believe they are, yes.

24 Q They're all different, separate companies, right?

25 A They all have their own legal status.

1 Q But you were told, I want to be clear so the jury
2 understands how you formed your opinions. You were told by
3 Hallmark's counsel to treat them all as one and the same and
4 ignore all those legal distinctions, weren't you?

5 A For the purpose of my damage calculations.

6 Q Right. So all your damage calculations are based on you
7 ignoring the differences between these companies, correct?

8 A You know, that's a broad statement. My determination of
9 the ultimate damages did not take those distinctions into
10 account.

11 Q Let's be real clear, again, sir. Your unjust enrichment
12 damages, the avoided costs, didn't matter to you. Those were
13 the words you used. Didn't matter to me who, in fact, saved
14 the costs? Isn't that right?

15 A I think what I said was at the end of the day I didn't
16 draw a distinction of what the final empty pocket would have
17 been.

18 Q Sir, did you say in plain English, it didn't matter to me
19 who avoided the cost?

20 A I don't know if I used exactly those words. If I did,
21 they're in there. I don't know.

22 Q We'll look at them. Then as regards the realized gains,
23 that \$4.8 million, your testimony was, didn't matter to me who
24 got that benefit, isn't that right?

25 A Who ultimately received it.

1 Q Didn't matter to you, right?

2 A Under the assumptions that I performed my analyses I
3 identified the amount of fees that were received.

4 Q No, sir. You identified the amount of fees that went out.
5 You didn't care who ultimately received the benefit, isn't that
6 right?

7 A No. They went out to Monitor Clipper. And what the
8 ultimate distribution of them, after they went out to Monitor
9 Clipper, was not part of my analyses.

10 Q Are you going to tell the jury that that was your
11 testimony at your deposition, sir?

12 A I'd have to look at exactly what you're speaking to but my
13 analysis didn't take into account the ultimate disposition of
14 those fees. It took into account where they went.

15 Q Did you read your deposition, sir, before you came to
16 testify today?

17 A I did.

18 Q When is the last time you read it?

19 A A few days ago.

20 Q Now, you've testified a lot as an expert witness, isn't
21 that right?

22 A I've testified a few times.

23 Q And the rules, you understand the rules are, as your
24 attorney said to you right in the beginning, you give us your
25 report, right?

1 A Yes.

2 Q So you write it all out and we read it, right?

3 A I provided my report.

4 Q And then we send our reports back, right?

5 A There are reports from other experts, yes.

6 Q There are reports from other experts on your report,
7 right?

8 A The reports that came back had rebuttal of my report and
9 other things.

10 Q So you did receive reports about your report, correct?

11 A Yes.

12 Q And then you have to submit to a deposition, right?

13 A I did give a deposition in this matter, yes.

14 Q At your deposition you're suppose to answer all of my
15 questions and tell me all of your theories, right?

16 A I answered your questions.

17 Q You're not suppose to come here today and talk about new
18 stuff, right? If I asked you something in your deposition you
19 said it's A. Not suppose to come in here and say it's now B,
20 right?

21 MR. GERMAN: Object.

22 THE COURT: Sustained.

23 BY MR. MANCHEL:

24 Q Sir, I'll ask you again. When you talk about the wiring
25 that went out, did you care who ended up with that benefit when

1 you did your analysis?

2 A Care isn't, wouldn't put that into it. My analysis didn't
3 take into account what happened after the wire went into the
4 MCP bank, no.

5 Q You also said, talked about the bids. And you said,
6 again, I wrote this down as best I could.

7 Jeff, would you pull up, please, I believe it's
8 Plaintiff's Exhibit 547N.

9 Now, sir, when you were brought to this, as best as I
10 could take my notes, you said, parties were invited to
11 participate in a second round bid, right? So there was a first
12 round then parties were invited to participate, right?

13 A As I understand it, yes.

14 Q And you based your bid differential testimony on, I think
15 you said your review of all of the bid materials and
16 depositions that had been collected from the various bidders,
17 right?

18 A That were provided to me, yes.

19 Q Well, were you not, do you think you got the documents and
20 depositions of all the bidders or do you think you created an
21 opinion with less than all of the documents?

22 A I received what I received and I created my opinion based
23 on what I received.

24 Q I want to be clear. Do you think your opinion is based in
25 fact on you having looked at the documents from the other

1 bidders and read their depositions?

2 A What I was provided was what I used for my opinion.

3 Q I don't know what you were provided, sir. So my question
4 is do you believe that before you came up with this bid
5 differential theory that you looked at the documents produced
6 by the other bidders, that you looked at the documents from the
7 other bidders, they're all listed there, and you looked at the
8 depositions of those bidders who were deposed, did you look at
9 all of that before you came up with your opinion?

10 A I looked at everything that I was provided. I can't look
11 at things that I don't have.

12 Q I know that, sir. But what I'm saying, I don't know what
13 you were provided. Do you remember, let me ask you this. Were
14 you provided with the documents from the bidders and the
15 depositions of the bidders?

16 A What I was provided is referenced in my expert report.

17 Q Well, your expert report and we went through this at your
18 deposition, lists thousands of documents, doesn't it?

19 A There were thousands of documents in this case.

20 Q And you remember me asking at your deposition how can I
21 tell from the thousands of documents what you actually looked
22 at? Do you remember me asking you that? You just read it a
23 couple days ago.

24 MR. GERMAN: Could we have page and line, please?

25 MR. MANCHEL: I don't have it in front of me right

1 now. I'm asking if he remembers me asking that question.

2 THE WITNESS: I think you did ask questions about the
3 documents.

4 BY MR. MANCHEL:

5 Q So I can't tell. My question is can you tell me now, yes
6 or no, that you looked at the documents submitted that you
7 received from these bidders and the depositions of the bidders
8 before you came up with your \$87 million theory?

9 A Well, I can tell you that the initial bid information was
10 taken from a William Blair document that provided that
11 information. And that the footnotes to this exhibit, which
12 aren't on this, indicate where I got the other information that
13 I got. And I do recall reading depositions from the second
14 round, I or my staff, from the second round bidders whose
15 depositions were provided to us.

16 Q You remember reading the deposition of that top bidder
17 there, the one that paid the most money of everybody, Fremont?

18 A I believe we reviewed that.

19 Q I think the man's name is Williamson?

20 A I don't recall sitting here, off the top of my head. But
21 I recall we reviewed that deposition.

22 Q Do you remember what he said about why Fremont dropped out
23 of the bidding?

24 A I don't have a direct recollection at the moment.

25 Q Remember he said that Fremont dropped out of the bidding

1 because he thought it would go very high above \$300 million?

2 Do you remember hearing that?

3 A If that was in there, I don't have that in front of me.

4 Q Okay. And if he said that, that would be another bidder
5 thinking that the price of RPG would be over \$300 million?
6 Isn't that right?

7 A Not necessarily. That said that the most they were
8 willing to pay as reflected in their willingness to put a
9 second round bid in that they did not actually submit was
10 between 215 and 220.

11 Q Let me see if I can refresh your recollection about what
12 was said. This is the deposition of Mark Williamson,
13 September 8, 2011, page 142, line 17. Well, I think that --

14 MR. GERMAN: I'm going to object. It's not
15 impeachment. It's not his testimony.

16 THE COURT: He has indicated that he reviewed it, so
17 I'll allow cross-examination on that issue. Proceed.

18 MR. MANCHEL: Thank you, Your Honor.

19 BY MR. MANCHEL:

20 Q Well, I think that, you know, we knew it was 280 to 310.
21 So cleared the first round. So I suspect we felt that
22 something in that range would be necessary to buy at this
23 point.

24 A You know, it sounds like he's talking about the first
25 round bid, not the second round bid.

1 Q He said so cleared the first round?

2 A I'd have to read the entire context of that. I know he's
3 referencing the first round.

4 Q You started to go a little while back to the question of
5 what we call, well, what you called capital constraint. Do you
6 remember the little bullet points said there would be no
7 capital constraint?

8 A I'd have to look on another exhibit. No capital
9 constraint, what the exact words were. But I didn't feel that
10 there would be a capital restraint problem.

11 Q I want to be clear now, you testified today that you
12 didn't think there would be a capital constraint problem for
13 Clipper, right?

14 A Yes.

15 Q And let me show this jury, to show them there would be no
16 capital constraint was the first indication of interest letter
17 from July, correct?

18 A That is what was put in front of me, yes.

19 Q Now, in your deposition when I asked you why there
20 wouldn't be capital constraint, you said there wouldn't be
21 capital constraint because the beneficial owners other than
22 Clipper would have the wherewithal to pay, isn't that right?

23 MR. GERMAN: Could I have page and line on that,
24 please?

25 MR. MANCHEL: I'll get to it in a moment.

1 THE COURT: Let's show him the testimony. Let's be
2 fair.

3 MR. MANCHEL: Jeff, turn to Serwin deposition, page
4 247, line 5. I'm sorry, Jeff. Question starts at 246, line 23
5 and runs from lines 23 to 25 and then from lines 1 to 8.

6 QUESTION: Would you take a look at paragraph 137,
7 please? About halfway down you write MCP would not face a
8 significant capital constraint as evidenced by its ability to
9 finance the majority of the RPG acquisition. Do you see that?

10 I do.

11 What do you mean by that?

12 That were to be the case that RPG would need to
13 finance its acquisition, it had the ability to do so as
14 evidenced by the fact that it was able to finance it.

15 Right.

16 A Yes.

17 Q So at your deposition --

18 MR. GERMAN: Your Honor, for completeness I think he
19 ought to read the next question and answer, put it in context.

20 THE COURT: Let's put it in context. Read the next
21 question and answer, please.

22 MR. MANCHEL: Well, actually, we can go all the way
23 down the page.

24 So the next one is Question --

25 Could I first ask a question about the question I

1 asked, Your Honor?

2 THE COURT: You can ask the question about the
3 question you asked but then fill in the blanks.

4 MR. MANCHEL: Then I will go to the next. Thank you,
5 Your Honor.

6 BY MR. MANCHEL:

7 Q So the first response we see here is that RPG would be the
8 one financing it, correct?

9 A If that were to be the case, RPG would need to finance the
10 acquisition, yes.

11 Q RPG is not Clipper, right?

12 A No, RPG is not Clipper.

13 Q So that position doesn't solve the capital constraint
14 issue for Clipper, correct?

15 A I'm trying to determine what I meant by the its. There
16 were a lot of its in there.

17 Q Okay. We'll keep going. Your counsel would like, I'll
18 keep going. So let's go now, Jeff, to lines 9 through 25.

19 QUESTION: Well, sir, what you're talking about in
20 paragraph 137 is the running royalty analysis, correct?

21 Yes. While I'm talking about it, what type of form
22 of the royalty would take?

23 QUESTION: Right. And the form being addressed is
24 when you talk about would not face a significant capital
25 constraint that's as regards the running royalty, correct?

1 ANSWER: No. It's with respect to, if so a lump sum
2 is a large up front payment so it was a question of would a
3 licensee have the wherewithal to pay the large amount up front.
4 If they don't have the wherewithal then the negotiation, it's
5 hard to imagine that it would result. You know, if you tell
6 me, you know, I've got a thousand dollars in the bank and I
7 need to pay 10,000 for something and the bank won't loan me the
8 9,000, it's just not going to happen. So in terms of liquidity
9 constraint that's the context I'm thinking of. And the fact
10 that Monitor Clipper had relationships with large banks,
11 investment banks, such as Credit Swiss First Boston and was
12 able to finance its acquisitions, it had access to liquidity
13 and it was a borrower that banks like Credit Swiss First Boston
14 saw as a viable debtor from their point of view.

15 Do you see all of that?

16 A I do.

17 Q Then I said to you, is Monitor Clipper Partners the
18 borrower for Credit Swiss?

19 And you said, I imagine Fund II was. And as I
20 mentioned throughout this, they're -- my analysis does not draw
21 distinction between Monitor Clipper Partners L.L.C. and Fund
22 II.

23 That's what you said, right, sir?

24 A Yes.

25 Q And that's true. When you were talking about capital

1 constraints, you didn't draw a distinction between Fund II and
2 Monitor, isn't that right? Clipper, isn't that right?

3 A What I said was Clipper has the ability through its
4 relationship with banks that it can get loans. That's one
5 thing.

6 Q Who could it get a loan for, sir? Using your terminology,
7 who did it get the loan for?

8 A It didn't get a loan.

9 Q It didn't get a loan?

10 A That isn't what I was saying. I was saying whether it had
11 the ability to get a loan to finance a lump sum royalty. This
12 is not about what actually happened. This is about would they
13 have been able to get a loan to pay that amount of money, if
14 necessary.

15 Q Jeff, would you highlight on page 248, would you bring up
16 the next, we didn't get to read it, the next line 17 through
17 19?

18 So even when it comes to borrowing, you don't draw a
19 distinction?

20 No, I don't.

21 That was part of your analysis, right, sir?

22 A In the ultimate analysis did not draw distinctions between
23 MCP and Fund II, no.

24 Q Sir, that was how you did your analysis was by not drawing
25 a distinction, isn't that right?

1 A For the overall analysis, I didn't draw a distinction, no.

2 Q And you didn't draw a distinction because Hallmark's
3 lawyers told you not to draw a distinction, isn't that right?

4 A I was under the instruction that there was not a
5 distinction to be drawn for purposes of damages.

6 Q In fact, sir, you have to draw a distinction, don't you?

7 A I don't know that.

8 Q You don't know, sir, in testifying today you have to say
9 only the benefits and the royalties that would have been
10 received or paid by Clipper and no one else? You don't know
11 that?

12 A The testimony I'm giving today is what the reasonable
13 royalty that would have been negotiated by Clipper and would
14 have been agreed to by Hallmark and what that is.

15 Q My question to you, sir, is do you understand that to this
16 jury the only thing you're suppose to talk about is Clipper and
17 Adam Doctoroff, when we talk about who got what benefit and who
18 would pay what?

19 A What I've done is I've prepared an analysis of the
20 hypothetical negotiation that would have been between MCP and
21 Doctoroff on one hand and Hallmark on the other and what the
22 resolution of that negotiation would have been in terms of a
23 reasonable royalty.

24 Q I agree with you. And the resolution of what that would
25 have been is a price that folks, besides Clipper, who are not

1 in this case would have paid, isn't that right?

2 A I didn't do an analysis of where the ultimate dollar would
3 come from.

4 Q Right. You didn't do an analysis of whether Clipper would
5 pay it, did you, sir? It's going to come from somewhere,
6 right?

7 A I did an analysis of what the royalty that would be agreed
8 upon would be.

9 Q Well, let's be clear about this. You did an analysis of
10 what you thought the price should be. Isn't that right?

11 A The royalty is the price for the license.

12 Q But you never concluded and you've offered no opinion
13 that, in fact, Clipper would agree to pay that price, isn't
14 that right?

15 A In terms of where it ultimately at the end of the day
16 would have come from, I don't have an opinion as to that.

17 Q Well, in fact, sir, you did have an opinion. Your opinion
18 was it would be paid by the beneficial owners of all of the
19 profits and revenue, isn't that right?

20 A I'd have to look back at that section you were talking
21 about. But my analysis is based on that at the time the
22 parties in the negotiation are Clipper and Doctoroff and
23 Hallmark. There's going to have to be a royalty paid and that
24 is what the royalty is.

25 Q And that is exactly what your opinion is, sir. Your

1 opinion is there's going to have to be a royalty paid and then
2 you determined that the people that have to pay that royalty or
3 would pay that royalty were not going to be Clipper or Adam
4 Doctoroff, isn't that right?

5 A At the ultimate resolution at the end of the day, I think
6 we looked at my testimony already.

7 Q Which is the beneficial owners would pay, right?

8 A Yes.

9 Q So that's Fund II, RPG, RPGI and RPG Holdings, right?

10 A I didn't look at that distinction.

11 Q You didn't even look to see which of the companies would
12 pay it but it's amongst those companies, right?

13 A That wasn't part of my analysis.

14 Q Now, you were retained by Hallmark, in your words, to be
15 an economic expert, correct?

16 A That is what I do, yes.

17 Q And you said to the jury in response to a question that
18 was phrased to you that in essence that you, let's take it in
19 two pieces. You do a lot of testifying, don't you, sir?

20 A I do economic testimony as part of my employ, yes. I do
21 other work that doesn't involve testimony as well.

22 Q You said in response, if I remember correctly, to your
23 counsel's question that you testified a number of times about
24 reasonable royalties, correct?

25 A I've testified in deposition about them, yes.

1 Q You've never testified in a case, have you, sir?

2 MR. GERMAN: Objection.

3 BY MR. MANCHEL:

4 Q I'm sorry. At trial.

5 A At trial, I don't believe that I've testified in trial
6 about a reasonable royalty, not yet, no.

7 Q Then you testified that you wrote a lot about economic
8 damage analyses, correct?

9 A I don't think I said a lot. I think I said I have written
10 on it.

11 Q You have written on economic damages, haven't you, sir?

12 A I have at least one publication out on it.

13 Q And we looked at your C.V. You have a lot of articles,
14 too, right? Publications and working papers and presentations,
15 there's all sorts of stuff there, right?

16 A There is a difference between publications and
17 presentations. And the publication that I have is with respect
18 to the issues surrounding royalties is the one, Don't Feed the
19 Trolls. That is the publication related to it. And then I've
20 done presentations in the past.

21 Q Sir, the jury hasn't yet had the opportunity to see your
22 resume. Is it fair to say that substantially all, all except
23 maybe one of your publications, presentations and like are
24 about patents?

25 A Your characterization of my publications that are listed

1 on here, there are 4 publications, 3 of which are as an
2 economist. They don't relate to damages at all.

3 Q I'm sorry. I meant to talk only about the ones that go to
4 damages?

5 A I've done a lot of work on patent in the context of
6 reasonable royalty. Reasonable royalty comes up very
7 frequently in patents. And it's a very debated and talked
8 about topic and I've been involved in that conversation.

9 Q But reasonable royalties for patents are different than
10 reasonable royalties for trade secrets, right?

11 A Patent infringement is patent infringement. Trade secrets
12 is trade secrets. As I understand it a remedy in a trade
13 secret matter can be a reasonable royalty and I performed a
14 reasonable royalty calculation using methodologies that are
15 commonly used in patent and they are commonly used, transferred
16 over to trade secrets.

17 Q Now, the defendant in this case, the corporate defendant
18 is Monitor Clipper Partners L.L.C., right?

19 A And Mr. Doctoroff.

20 Q I said, I'm sorry, the corporate defendant?

21 A Okay.

22 Q You understand that, right?

23 A I take your representation.

24 Q Do you have any reason to believe that Monitor Clipper is
25 not the defendant in this case?

1 A No, I don't. You're putting a qualifier on it. It's not
2 my expertise so if they're the corporate defendant, they're the
3 corporate defendant. I don't know that Doctoroff is not a
4 corporate defendant. I don't have an understanding.

5 Q So do you understand that the two defendants are Monitor
6 Clipper Partners and Adam Doctoroff, right?

7 A Yes.

8 Q And you're not an expert, you're not here to testify as an
9 expert on how private equity firms work, right?

10 A I am not.

11 Q And you're not here to testify on how private equity firms
12 raise money or capital, right?

13 A I'm not.

14 Q And you're not here to testify on how private equity firms
15 sponsor funds like Funds II, correct?

16 A I am not.

17 Q Now, when we look at your economic analysis, I want to
18 make sure I understand what trade secrets you claim are
19 supposedly at issue in this case. For purposes of your
20 economic damages analysis, Hallmark's lawyers told you to
21 assume Clipper misappropriated and used all of the trade
22 secrets embodied in the presentations at issue in this case,
23 isn't that right?

24 A That is probably what I wrote.

25 Q Do you have any reason, I'm happy to show you your

1 testimony, sir. Do you have any reason to believe that's not
2 true?

3 A No.

4 Q Okay. And you discussed at length with Hallmark the trade
5 secrets that Hallmark thinks are in the presentations, correct?

6 A I wouldn't characterize it that way. I understand that
7 the compilation that is the five presentations provide certain
8 benefits and that they would be benefits to others who would
9 use them and they're benefits to Hallmark.

10 Q I'm asking a slightly different question, sir. I know you
11 want to call these things compilations but my question to you
12 is, you talked about, you talked with Hallmark about what you
13 call the trade secrets that are in the presentations, isn't
14 that right?

15 A The presentations embodied trade secrets.

16 Q Jeff, could you pull up, please, page 69, lines 16 through
17 19.

18 ANSWER: Well, I discussed at length the
19 presentations with the individuals at Hallmark to ask them what
20 are the trade secrets that you allege are in here.

21 Do you see that?

22 A I see.

23 Q That's your answer?

24 A Okay.

25 Q Is that the truth, sir?

1 A That is what I asked, yes.

2 Q So you met with Hallmark so that Hallmark could take you
3 through the presentations and show you the trade secrets that
4 Hallmark claims are in the presentations, right?

5 A That was my answer to the question, yes.

6 Q Is it right?

7 A I asked them, I understood these presentations, I take it
8 the assumptions, I'm not here to identify what trade secrets
9 are at issue. I take that, that's outside the scope. I work
10 under an assumption that there are trade secrets and that the
11 defendants are liable for misappropriation of the trade
12 secrets. I understand that the five presentations are
13 compilations of things and I said, well, let's look inside what
14 kind of things are in here.

15 Q Well, I'm not saying, sir, we'll get to this in a little
16 bit. I'm not saying, sir, that you can identify the specific
17 trade secrets. Hallmark told you what they thought were trade
18 secrets. I'm just trying to figure out what it is that you
19 were told when you did your analysis. And this is one of the
20 things that you were told. You were told about the trade
21 secrets that were in the presentations. I understand you were
22 told about this compilation thing but you were also told about
23 the trade secrets Hallmark claims were in the presentations,
24 right?

25 A There were specific items in there. I said, well, what

1 kind of things are we talking about? What kind of things would
2 be beneficial.

3 Q You didn't say what kind of things. You said what are the
4 trade secrets that you allege are in here?

5 A My answer was what my answer was. I'm explaining that
6 answer right now.

7 Q Now, sir, you don't even know if the presentations were
8 provided directly to Clipper, isn't that right?

9 A I understand that the first three were provided directly
10 to Clipper.

11 Q Jeff, would you go, please, to page 20, line 16 through
12 23.

13 Did you assume, sir, that all five presentations were
14 provided directly?

15 I don't know necessarily whether I made that
16 assumption or not. I, for purposes of my analysis, I have been
17 asked to assume that Monitor Clipper is liable for all of
18 Hallmark's allegations.

19 Do you see that answer, sir?

20 A I do. I also know there were other places you asked me
21 about the three and the two and I specifically answered that I
22 know the first three went to Clipper and the other two went the
23 to standing case team.

24 Q You specifically answered that, sir?

25 A I believe I did.

1 Q Didn't we go round and round for all sorts of minutes
2 about whether they were delivered to Adam Doctoroff or the
3 standing case team? Do you remember that line of questioning?

4 A I believe we went round and round on a lot of things, yes.

5 Q Yeah, we did.

6 A And I believe I told you there's an e-mail that has three
7 presentations attached to it. Two of the addressees of the
8 e-mail are Doctoroff and Kim. Doctoroff and Kim were at MCP so
9 those three went to MCP.

10 There are two other presentations. They have
11 individuals on them that aren't employees of MCP. They're
12 members of the standing case team. They went to the standing
13 case team.

14 For purposes of damages I do what an expert witness
15 does. I don't have any say on liability whatsoever in this
16 case. I don't intend to say anything about it. I asked what
17 are the allegations in the case and I do an assessment of
18 damages based on those allegations. The allegations are there
19 are five presentations as I understand the allegations in this
20 case. That's what I do.

21 Q My question is real simple, sir. You understand the
22 assumptions under which you work is that one e-mail went to
23 Clipper and the other two e-mails at issue in this case, the
24 other e-mail at issue in this case did not go to Clipper, isn't
25 that right?

1 A I think I just said that.

2 Q Okay. So let's just make sure we're clear because you
3 said a lot of other things. I just have a simple question.
4 Isn't it true that in this whole case, everything you looked at
5 as regards the communications, one e-mail with three
6 attachments went to Clipper, correct?

7 A I believe that's correct, yes.

8 Q And one e-mail with two attachments did not go to Clipper,
9 correct?

10 A One e-mail went to individuals that I understand are on
11 the standing case team.

12 Q So is the answer to my question, yes?

13 A I believe I have answered your question.

14 Q The second e-mail did not go to Clipper, did it, sir?

15 A I don't recognize any of those individuals as being
16 employees of Clipper.

17 Q Is that a yes?

18 A All I know is what I can read in e-mails. Okay? So that
19 e-mail didn't go to individuals that were employees of Clipper.
20 Do I know what happened to it after that? I don't know.

21 Q You don't know, do you, sir?

22 A No.

23 Q And when you sat down with Hallmark for them to show you
24 what were the trade secrets that were in the presentations,
25 they described for you the recommendations and conclusions that

1 were in those presentations, isn't that right?

2 A That was my understanding that the presentations included
3 recommendations and conclusions, yes.

4 Q I want to be clear about that. Those were the trade
5 secrets, sir, the recommendations and the conclusions, that was
6 your assumption, right?

7 A My assumption is that the trade secrets that are alleged
8 by Hallmark to have been misappropriated were misappropriated
9 and that's what I worked under.

10 Q I understand that. But I'm still trying to figure out
11 what it is your numbers are based on. I understand you didn't
12 pick out the trade secrets but you were told that the trade
13 secrets in this case were the recommendations and conclusions
14 that were in the presentations, right?

15 A I was told that's what the beneficial aspects of them
16 were, yes.

17 Q And you assumed in your analysis that Clipper in 2005
18 would have gone out and acquired or recreated all of the
19 information in all of the presentations, correct?

20 A No, that's not what I said.

21 Q What you called comparable. I don't mean word for word
22 but everything, your analysis assumes that everything in 2005
23 in the presentations would have been recreated in some
24 comparable form, right?

25 A No. What I assume is that Clipper would have to go out

1 and independently obtain consulting work that would generate
2 comparable recommendations and conclusions. And that Clipper
3 would have to go out and generate underlying research that
4 would enable the syntheses or summaries of that research that
5 are included in the presentation.

6 Q And I guess maybe I asked the question imprecisely. Who
7 ever did the work, your assumption is that in 2005, whether
8 it's Clipper or Clipper hiring people, the result of the
9 project in 2005, you assume had to be the recreation of a
10 hundred percent of what is in the presentations?

11 A That's not what I said. I said that there are
12 recommendations and conclusions that are of value. And in
13 order to get those recommendations and conclusions they would
14 have to engage consulting services, on one hand, that would get
15 them comparable recommendations and conclusions. And they
16 would have to create research that would enable them to get the
17 comparable syntheses and summaries of research that are in it.
18 It could be the case that you have to go out and get lots of
19 data to make a chart that is only a part of that data. You
20 can't make that chart that's a part of the data unless you get
21 all the data.

22 Q I'm just trying to get a handle, sir, on what the goal is.
23 The goal in your hypothetical analysis is the recreation in
24 substance of the five presentations, right?

25 A No. The goal of the recreation is of the necessary and

1 beneficial recommendations and conclusions and syntheses and
2 summaries of research that are incorporated in those
3 presentations.

4 Q So the goal is to be able to have the conclusions and the
5 recommendations, hypothetically, from the presentations and
6 what ever you need to do to do that, that's what is going to
7 happen, right?

8 A Yes.

9 Q But it's a hundred percent across the board. In your
10 theory, your analysis, I can't pick like one conclusion that I
11 really like. I have to go, under your analysis, do the work
12 for all the conclusions?

13 A Well, the allegations, as I understand it, is that all of
14 them were misappropriated so my analysis says if they were all
15 misappropriated, what would be necessary to get all of them.

16 Q What if I could get in 2005, strike that. You talked to
17 Hallmark about what folks could do in 2005 to go out and get
18 those conclusions, what they would have to do to get those
19 conclusions and recommendations, right?

20 A Well, I talked to Hallmark about what was necessary to get
21 the research that would generate the syntheses and summaries of
22 the research that were in the presentations. And I asked them
23 about what their costs were for the consultant.

24 Q And you asked them, sir, was there comparable information
25 out in the world that would allow Clipper to have the

1 conclusions and the recommendations or did Clipper have to go
2 and redo all of the work, right?

3 A I didn't ask that specific question.

4 Q Were you told there was no comparable research available?

5 A I was told that the results of the research that Hallmark
6 had in the presentations were not publicly available.

7 Q I didn't ask you that, sir. My question was, did someone
8 at Hallmark say to you, in substance, you can't find these
9 conclusions and recommendations anywhere. There is nothing
10 comparable out there?

11 A I mean that exact answer? No. What I asked was, is it
12 necessary to perform the research that you guys performed to
13 get the summaries and syntheses of information and the answer
14 was yes. Portions of that research were things that were
15 actually purchased. So they purchased research. So they
16 purchased things. If it's out there, they purchased them.
17 They went and had to get this over here and this over here and
18 this over here and buy all that and gave people to do surveys
19 of other people. And they put it altogether and it cost them a
20 certain amount to put all that together so that they could get
21 a chart here or summary there. That's really important.

22 Sometimes you go out to get a lot of information to
23 get a really important conclusion. Or a really important
24 summary. And that's what they did to get this information.
25 And that was something that if it wasn't handed over that

1 Clipper would have to go do to get the same thing.

2 Q So the really, actually, my question was did someone at
3 Hallmark said there wasn't comparable information but I'll come
4 back to that in a second. The really important thing you just
5 mentioned, if I heard everything you're saying correctly, is
6 the conclusion, right? That's really important, right? All
7 the work they had to do to get the conclusion. It's the
8 conclusion that's the ultimate trade secret, isn't it, sir?

9 A You know I'm not here to say what the ultimate trade
10 secret is. The value and the benefits that come are based on
11 what you're able to do and conclusions enable you to do
12 something.

13 Q Okay. Would you go to page 47, Jeff, lines 8 through 18,
14 please?

15 QUESTION: All right. What steps did you take to
16 determine what comparable information was available to Clipper
17 in 2005?

18 You know, I discussed with Hallmark whether or not
19 the syntheses and summaries of the research reflected
20 information that would be otherwise available to Monitor. And
21 it was my understanding from Hallmark that it would not be.
22 And that the only way to arrive at those would be to do the
23 same research or comparable research that Hallmark had done.

24 That was your answer in the deposition, sir, right?

25 A Yes.

1 Q I'll ask you, again, Hallmark told you that there was no
2 comparable information out in the market place in 2005, didn't
3 it?

4 A Yes.

5 Q You never looked, did you, sir?

6 A I'm not an expert in market research or surveys or
7 anything of the sort.

8 Q My question to you, sir, is, did you look for comparable
9 information before you told this jury there's no comparable
10 information?

11 A I relied on Hallmark.

12 Q Did Hallmark tell you, since you relied on Hallmark, did
13 Hallmark tell you that the conclusions from these presentations
14 had been released to the public by Hallmark to Hallmark
15 competitors?

16 A No. Hallmark did not tell me that.

17 Q Have you been reading the daily transcripts from this
18 trial, sir?

19 A No, I have not.

20 Q So you haven't heard about Don Hall's testimony that
21 conclusions from the BMR were given to the Greeting Card
22 Association and American Greetings?

23 A I have not heard any such thing.

24 Q Would that change your testimony, sir, if you knew
25 Hallmark was giving the conclusions from the BMR out to the

1 public?

2 A It wouldn't change my conclusions one way or the other. I
3 assumed liability in this case so liability is that these are
4 valid trade secrets and that these trade secrets have been
5 misappropriated.

6 Q I know you assumed liability, that's clear. But you
7 assumed liability because Hallmark told you there was no
8 comparable information out there. And you assumed liability
9 because Hallmark told you that the conclusions and
10 recommendations in these presentations were still secret, isn't
11 that right?

12 A No. I assumed liability because that's what a damages
13 expert does. I'm not here to speak to liability one way or
14 another. If there is not liability, there is not damage and
15 that's it. I'm here to speak under the assumption that
16 liability is found for the allegations in this matter what the
17 damages would be.

18 Q Sir, you know, because you told me at your deposition, you
19 know that if something is not secret, it's not a trade secret,
20 right? You know that?

21 A Yes.

22 Q And you know that if something is made public, it's not a
23 trade secret, right?

24 A In general that's my understanding as a lay person. It's
25 not a legal understanding. I'm not here to make legal

1 opinions. I'm not here to opine as to what is or is not a
2 legal trade secret or whether or not they were misappropriated.
3 I'm here to assume that there were trade secrets and I've
4 defined the trade secrets that I did my analysis on and that
5 the defendants are liable for misappropriation. I don't have
6 any other opinion and it's outside the scope of my
7 understanding or ability to do so.

8 Q And you know, sir, that when a company just uses its,
9 let's call it secret information, just the use of it results,
10 the lawful use results in the disclosure of information and
11 conclusions, isn't that right?

12 A I don't know that.

13 Q You don't know that today or you didn't know it during
14 your deposition?

15 A I'm not sure I understand the question.

16 Q The question to you is, sir, you understand that the
17 lawful use of secret information by, trade secret information
18 by a company, the lawful use results in the disclosure of the
19 information, doesn't it?

20 A I don't know. Is it possible it can? It's possible it
21 can. I don't know that in every circumstance it does. You
22 have companies that every day have trade secrets and use their
23 trade secrets and they still are trade secrets. Some times it
24 could be, depends what the use is and what happens with it.

25 Q Right. And if the use results in the public disclosure of

1 the conclusion, you know that it's no longer a trade secret,
2 right?

3 A No, I don't know that.

4 Q So just to be clear, your assumption though is their trade
5 secret is conclusions in the BMR, is conclusions in the
6 presentations were trade secrets because they were still
7 secret, right?

8 A No. I don't know anything with respect to other than that
9 I was told to assume these are trade secrets and to assume that
10 the defendants are liable for them.

11 MR. MANCHEL: That's all I have, Your Honor.

12 THE COURT: Let's take about an hour for lunch.
13 Don't talk about the case. Wait until you hear all the
14 evidence. We'll see you back here about 1:10. We'll be in
15 recess.

16 (Witness temporarily excused.)

17 (The following proceedings were had OUT OF THE
18 PRESENCE AND HEARING OF THE JURY:)

19 MR. GERMAN: Your Honor, may we see you about 5
20 minutes before the jury comes back?

21 THE COURT: -- because 5 minutes before the jury
22 comes back seems to turn into longer.

23 MR. GERMAN: I just wanted to revisit the colloquy we
24 had at the bench on the unjust enrichment issue on whether the
25 plaintiff is entitled to ask for both of what it cost and gains

1 or whether you have to choose one or the other. The discussion
2 in that order was in the context of addressing objections we
3 had raised to Dr. Blaydon. And in that passage of your order
4 you cited a treatise in Salisbury Labs case for the proposition
5 that in a typical case you can get avoided costs or gains but
6 not both. And you dropped the footnote citing the Salisbury
7 Labs case for that point, to avoid double counting, that's the
8 reason. And the reason for from the treatise and in this was
9 the case in the Salisbury Labs case, sometimes in a trade
10 secret case the avoided costs are what enables the defendant to
11 earn more profits. And so the avoided costs might be a hundred
12 dollars and as a result of not having spent the hundred dollars
13 your profits go from 20 to 30. So you could get either the
14 hundred or the 10. But you can't get 110 because that would
15 double count. Okay? That's the way we read your order.
16 That's what Salisbury Labs holds.

17 In our case, they're entirely different. Because the
18 gains we're talking about were not achieved by Clipper as a
19 result of them not having to incur costs for research or
20 consulting fees. But rather because they closed the deal. So
21 the two stand independently. There is no double counting at
22 all. And that's why the presentation was presented as it was
23 and proceeded as it was, presented in the expert report and in
24 the motions for summary judgment as they were.

25 THE COURT: The problem I have with your analysis,

1 Charlie, is that if Clipper had spent the money to hire
2 consultants and if they had done the research, then it would
3 have earned the management fee and the transaction fee. And if
4 you assume that's true then they shouldn't be punished for the
5 transaction fee or the management fees. That shouldn't be a
6 component of the damages.

7 Now, I sent Steve back to the books while we were
8 working this morning. He and I haven't talked so there may be
9 some additional, may be some additional information I'm not
10 aware of but that's my view at the moment. He and I will talk
11 over lunch hour and I'll come back and tell you what my final
12 thought is.

13 MR. GERMAN: Thank you.

14 MR. MANCHEL: I think the parallel is their argument
15 is but for the use of the trade secrets the deal wouldn't have
16 happened. So it's either got to be one or the other. I think
17 it's actually the Salisbury case directly which they claim we
18 avoided costs and as a result we got a gain. So I think--

19 THE COURT: We'll talk about it. I'll be back about
20 1.

21 (Noon Recess)

22 (The following proceedings were had OUT OF THE
23 PRESENCE AND HEARING OF THE JURY:)

24 MR. DONOVAN: Your Honor, if we're just addressing
25 the -- I don't want to hold up the Court.

1 THE COURT: I looked at some additional case
2 authority over the lunch hour. And I am persuaded that I was
3 right in what I thought before we left. I don't think that
4 Hallmark can recover both for the avoidance costs and the fees
5 earned by Monitor Clipper after the transaction closed. I
6 think that the transaction fees and the management fees would
7 have been earned in any event had Monitor Clipper spent the
8 \$6.2 million to replicate the research testified to by
9 Mr. Maynard and the \$5 million that was paid for the greeting
10 card aspect of the BMR. And so I will instruct the jury at the
11 appropriate time that they can't award both. I assume that
12 Hallmark will want to submit the 11 million dollar figure.

13 Then the question becomes how does the defendant want
14 me to handle that now? I can go back and tell the jury that
15 they can disregard that portion of the testimony or we can
16 simply deal with it as an instructional issue at the
17 appropriate time.

18 MR. MANCHEL: If the management fee piece of that
19 dropped then I wouldn't ask for an instruction, just go to the
20 jury on that one cost piece. We don't have to make a big deal
21 about it. I can actually adjustment my questions today and
22 just move on, period. If both are going to still be put forth
23 then I think there should be something relatively soon in
24 connection of time with what was said, maybe after I've done my
25 cross, just to let the jury know maybe they shouldn't be

1 looking at both.

2 THE COURT: Well, the instruction will allow the jury
3 to award damages for unjust enrichment based on the avoided
4 cost only.

5 MR. MANCHEL: Okay. That was my question, is if
6 plaintiff's in fact are going to, which I assume they will,
7 drop that piece.

8 MR. GERMAN: Drop it? We'll make an appropriate
9 record for Your Honor but understand the Court's ruling and I
10 think it's an instructional issue.

11 THE COURT: I think it is, too. The question is what
12 do we do about the evidence the jury has heard and I'm hearing
13 you say, don't emphasize it.

14 MR. MANCHEL: I think if your instruction is going to
15 be it's for the cost, I'm okay with just moving forward.

16 THE COURT: All right. And if you become very
17 uncomfortable, let me know we'll take a break.

18 MR. GERMAN: What we will do, Your Honor, is submit
19 an instruction that we think --

20 THE COURT: I think you already have.

21 MR. GERMAN: If that instruction is refused then that
22 will be our record. That will be fine.

23 THE COURT: Yes. We've got about 10 minutes if you
24 want to mill around, feel free to do that. Five minutes. I'm
25 sorry.

1 (Recess)

2 (The following proceedings were had IN THE PRESENCE
3 AND HEARING OF THE JURY:)

4 THE COURT: Welcome back. Be seated, please.

5 Mr. Manchel, when you're ready.

6 MR. MANCHEL: Thank you, Your Honor.

7 KENNETH SERWIN, RESUMED

8 CONTINUED CROSS-EXAMINATION

9 BY MR. MANCHEL:

10 Q Dr. Serwin, the presentations at issue in this case were
11 created by Monitor Group, correct?

12 A By who?

13 Q Monitor Group?

14 A That's my understanding.

15 Q Clipper had nothing to do with the creation of the
16 presentations, correct?

17 A Not that I'm aware of.

18 Q And the presentations at issue in this case were created
19 in the 2001, 2002 time period?

20 A That's my understanding, yes.

21 Q Would you put up on the screen, please, Jeff, Plaintiff's
22 Exhibit 487.

23 This was the e-mail with the presentation attachments
24 that were sent to Adam Doctoroff, correct?

25 A I believe so, yes.

1 Q And these are the only presentations you're aware of that
2 were sent directly to Clipper, correct?

3 A These are the only ones that I have seen an e-mail that
4 went to individuals or employees of Clipper, yes.

5 Q Are you aware of any other presentations at issue in this
6 case that went directly to Clipper?

7 A I don't know any other ones that went directly to Clipper.

8 Q Would you put up, Jeff, please, Plaintiff's 488?

9 This is the e-mail that attaches the other two
10 presentations at issue in the case, correct?

11 A I believe so.

12 Q Do you have any reason to believe it's not, sir?

13 A No.

14 Q The two presentations attached to this e-mail were sent
15 only among Monitor employees, correct?

16 A They were sent to employees that I understand were members
17 of the standing case team.

18 Q My question to you, sir, was, they were sent only to
19 Monitor employees, correct?

20 A I believe these are only Monitor employees.

21 Q Thank you. Now, as you just said the Monitor employees
22 who received this e-mail were on the standing case team,
23 correct?

24 A That's my understanding.

25 Q And you also understand, sir, that the Monitor standing

1 case team was made up of Monitor employees, not Clipper
2 employees, correct?

3 A That's my understanding that they were Monitor employees
4 who worked with Clipper.

5 Q I didn't ask you who they worked with. My question was,
6 do you understand, can you tell this jury, these are Monitor
7 employees who are on the standing case team but they're Monitor
8 employees, not Clipper employees, correct?

9 A That's my understanding.

10 Q Now, as we just discussed your damages theories, your
11 damages theories assumes that Clipper received and used
12 100 percent of the trade secrets embodied in the presentations,
13 correct?

14 A My damage theory assumes that the five presentations are
15 the trade secrets at issue and that Clipper is liable for
16 misappropriating those trade secrets.

17 Q Well, you understand the trade secrets at issue, that's
18 part of it. But my question to you though is, were you also
19 told to assume, let's break it up for the jury. No. 1, you
20 were told to assume the five presentations we just looked at
21 are the presentations at issue, correct?

22 A Yes.

23 Q No. 2, you were told to assume by Hallmark's attorneys
24 that the five presentations were misappropriated and used by
25 Clipper, correct?

1 A Yes.

2 Q And you have that assumption because the lawyers told you
3 to work under that assumption, correct?

4 A Yes.

5 Q Now, you know for a fact though that Clipper didn't
6 misappropriate and use all of the trade secrets in this
7 presentation, isn't that right?

8 A I don't know that in fact.

9 Q Well, we just talked a moment ago about the notion that it
10 was Monitor who created these presentation trade secrets,
11 right?

12 A Yes.

13 Q So Monitor is the entity that put the work into them,
14 created them, formed them, all that good stuff, for the BMR,
15 right?

16 A Well, Monitor is a consulting firm that was engaged by
17 Hallmark and incorporating inputs provided by Hallmark
18 including the Hallmark employees that worked with the Monitor
19 consulting team, because that's how consultants work, because
20 they don't do their work in isolation. They were there, I
21 understand, and working with Hallmark employees. And as a
22 result of all of that work and all the input these
23 presentations came out of it.

24 Q Jeff, would you go back to 487, please? And go to the
25 first presentation, page 93.

1 I just want to be clear about kind of who's doing
2 what. This is one of the presentations at issue in the case,
3 correct?

4 A Yes.

5 Q This is a presentation that was physically created, put
6 together by Monitor, correct?

7 A Monitor certainly was deeply involved in putting this
8 together, yes.

9 Q Well, now, I'm not challenging your view, sir, on the
10 notion that Hallmark provided people and help and research. My
11 question is Monitor is the one that presented and created this
12 document, right?

13 A To the best of my understanding, yes.

14 Q So Monitor, we don't know who but Monitor made the
15 decisions about what is going in there for this OEC
16 presentation, right?

17 A You know, I don't know that, I don't know for a fact
18 whether only Monitor employees were the ones who made the
19 decisions or whether or not it was a combination of Monitor and
20 a Hallmark team in there working. I don't know.

21 Q Okay. And in this case, before Clipper supposedly used or
22 took anything, Monitor actually went through these
23 presentations and determined whether and to what extent
24 anything was still relevant, isn't that right?

25 A I don't know if that's true or not.

1 Q Well, let's take a look at Defendant's 125, please, Jeff.
2 Would you highlight the top, please, Jeff, including the body
3 of the e-mail? Thank you.

4 Now, this is an e-mail only among Monitor employees,
5 correct?

6 A That's what it appears to be, yes.

7 Q So there is Jeff Pauker, who the jury saw. Grant Brown
8 and Megan Kahn and the subject is Levin decks condensed.
9 They're actually referring to the presentations that went to
10 Adam Doctoroff, aren't they?

11 A I expect that's what they're referring to.

12 Q Are they referring to any other presentations?

13 A I don't know.

14 Q Okay. Now, according to this e-mail they're going through
15 the presentations to condense the most salient information into
16 a 30-deck slide, right?

17 A That -- the e-mail speaks for itself.

18 Q Well, in fact, sir, you looked at the 30-deck slide as
19 part of your work, didn't you, sir?

20 A I did.

21 Q And you could see that out of hundreds and hundreds of
22 pages of the other exhibits, the other attachments, somebody
23 made the decision that this, these 30 slides were the salient
24 slides, right?

25 A What is written here is from Mr. Pauker and that

1 apparently is a statement he made.

2 Q Well, it's not what is just written, sir, you actually
3 looked at it, too. Right? You could see that those 30 slides
4 came from the other documents that were dramatically larger,
5 right?

6 A I can see that those 30 slides came from the other
7 presentations. That much I can see.

8 Q And can we agree that in kind of less high level English
9 salient means relevant?

10 A Salient means salient.

11 Q What does it mean to you? I just don't want to use a
12 definition that you're not using, sir.

13 A You know salient can mean important.

14 Q Okay. Let's use that. I'm fine with that. So the
15 company that created the presentations, let me ask you this,
16 you're not aware of any participation by Clipper in pulling up
17 the 30 important slides, are you?

18 A No.

19 Q So the company that created the presentations, Monitor,
20 went through them all and picked out 30 slides from everything
21 that those folks, at least, thought were important, right?

22 A It appears that Megan Kahn and Mr. Pauker.

23 Q Do you have any reason to believe that it wasn't done,
24 sir?

25 A No. I believe that whatever they said in that e-mail is

1 what they did.

2 Q Now, you actually looked, as I said, at this 30-deck slide
3 before you got, came to your opinion about what Clipper
4 misappropriated and used, right? You looked at this?

5 A No. I didn't have a opinion about what Clipper
6 misappropriated and used. I was asked to work under an
7 assumption and I did. I said before and I'll tell you again, I
8 don't have any opinions with respect to liability. I wasn't
9 asked to make any opinions with respect to liability. I asked
10 what are the trade secrets that Hallmark is alleging and I was
11 asked to assume what they are and that the defendants are
12 liable for misappropriating. That is a starting point
13 assumption that all economic experts use.

14 Q Well, I want to be clear, again, sir, your assumption
15 whether it's based on what Hallmark told you or not, fine. But
16 the assumption under which your theories were built was that
17 all of the presentations were misappropriated and used,
18 correct?

19 A My work is predicated on the assumption of what the trade
20 secrets at issue are and that the defendants are liable for
21 misappropriation and use.

22 Q I know you keep saying liability but I'm just trying to be
23 able to piece it out a little. When you say liability, you
24 mean because they were misappropriated and used, correct? And
25 I know it's an assumption.

1 A Liability means that they were misappropriated and used.

2 Q Okay. Now you went through this slide and --

3 Jeff, would you put up, please, 125, Defendant's 125,
4 please. I'm sorry. Plaintiff's 488.

5 When you went through the 30-deck slide, you didn't
6 see any presentations in it from the two that went only to
7 Monitor, correct?

8 A Well, the slides are from the three that were at issue
9 prior to the dates. As I looked at those e-mails, the e-mail
10 that went to the individuals that included the Clipper
11 employees was August 25 and it appeared that the other one you
12 just showed me was prior to this September 7 when the second
13 set of presentations were sent.

14 Q Let's go to Plaintiff's 487, please.

15 Now, of the three presentations attached to this
16 e-mail, when you looked at the 30-deck slide you determined
17 that one of the presentations in its entirety wasn't reflected
18 in the 30-deck slide, correct?

19 A That may be the case.

20 Q Now, you believed that the three presentations would
21 provide economic value to RPG, correct?

22 A The information that I understood from discussions with
23 Hallmark is that the three presentations would provide economic
24 value to RPG, yes.

25 Q And RPG isn't a defendant in this case, right?

1 A That's correct.

2 Q And isn't it true, sir, that you know that despite what
3 you were told to assume, it's impossible that all of the
4 information in the three presentations would provide economic
5 value to RPG, isn't that right?

6 A I don't know that one way or another.

7 Q Well, there is a section in the presentation on gifts,
8 right?

9 A I believe there is one that has some information about
10 gifts.

11 Q And did anyone tell you that RPG was thinking about going
12 into gifts?

13 A I believe there was a question of whether or not they were
14 interested in expanding into gifts.

15 Q Sir, someone from Hallmark told you that RPG was
16 interested in going into gifts?

17 A I believe that I was shown a document where there was a
18 reference to gifts, question mark.

19 Q Jeff, would you pull up line, sorry, page 40, line 4 to 7.

20 QUESTION: I didn't ask you, sir. I'm asking you did
21 someone at Hallmark tell you that in 2005 RPG was considering
22 going into a gifts line?

23 ANSWER: No.

24 Is that still true, sir?

25 A Well --

1 MR. GERMAN: That was not the question.

2 THE COURT: Sustained.

3 BY MR. MANCHEL:

4 Q Sir, did anybody tell you that RPG was going into a gifts
5 line?

6 A I believe I was directed to a document that had a
7 reference to gifts and Hallmark and that I did review that.

8 Q Did you review that before you gave this testimony?

9 A Yes. If you go back to page 39 of my deposition, there
10 was a question about discussions with Mr. Strickland and your
11 question was, did they go into a level of detail about
12 ornaments and gifts and how that might be of interest to
13 Clipper? And my answer was, with respect to gifts I think
14 there was a general discussion about the fact that for RPG to
15 grow and should it choose to go into the gifts line -- this
16 would be beneficial.

17 Q I understand there was a question, sir, in fact, we saw
18 the question the other day. I'm asking did someone at Hallmark
19 tell you, besides the question, that in 2005 RPG was
20 considering going into a gifts line? Your answer was no,
21 correct?

22 A I don't believe someone at Hallmark told me that, no.

23 Q Did someone at Hallmark tell you that RPG was considering
24 going into ornaments?

25 A No.

1 Q Did anyone at Hallmark say, strike that. Did you ever see
2 any information that suggested that RPG was interested in
3 operating captive stores?

4 A I don't believe I did.

5 Q Now, the presentations were created in 2001, 2002, is that
6 right?

7 A That's my understanding.

8 Q And they were created as part of what we've been calling
9 in this case the BMR?

10 A That's my understanding.

11 Q And between the time they were created in 2001, 2002 up
12 until, according to Hallmark still, 2005, Hallmark used the
13 presentations, correct?

14 A That's my understanding.

15 Q And according to you Hallmark started publicly
16 implementing the recommendations in the presentations as far
17 back as 2001, isn't that right?

18 A I don't know if I would use the word publicly but I know
19 that, my understanding from discussions with Hallmark is that
20 Hallmark incorporated certain of the recommendations and
21 conclusions that came out of the BMR project into its overall
22 business.

23 Q Now, the use of these presentations started about 4 years
24 before they were supposedly misappropriated and used by
25 Clipper, correct?

1 A No, I can't --

2 Q Three and a half?

3 A I don't know what the exact time line on that is. It was
4 before 2005.

5 Q And you believe, sir, that just by using the presentations
6 the trade secret information embodied in them gets disclosed
7 publicly, isn't that right?

8 A No, that's not correct.

9 Q Jeff, would you pull up page 309, line 24 through page
10 310, line 22.

11 So let's put this in context for the jury. And you
12 said it on direct with your counsel. One of the reasons you
13 argued for that \$29 million lump sum license was because of the
14 risk you claimed that with the license could come the public
15 disclosure of the trade secrets, correct?

16 A Yes.

17 Q And I asked you, so you built into, when you say should
18 the information get out, you mean information released with
19 Clipper using it appropriately under the license, correct?

20 Yes.

21 All right. So what you built into the lump sum
22 analysis you used is an assumption that as the holder of the
23 license Clipper would use the information and the information
24 as a result of the use would become public?

25 ANSWER: Yes.

1 And if it became public lawfully --

2 Then you said or part or parts of it would become,
3 you know --

4 But lawfully.

5 But lawfully.

6 Your assumption is that Clipper gets the exclusive
7 license and uses it. And as a result of the use of the
8 license --

9 Keep going, Jeff.

10 The license information becomes public and,
11 therefore, it's of lesser value.

12 Correct?

13 A It can happen, yes.

14 Q You didn't say it can happen. You said it does happen?

15 A It very well could happen.

16 Q And that's true. Right? So if the presentation trade
17 secrets, as you call them, are used by Hallmark, one by-product
18 of that is they will become public?

19 A You asked me a question and the question was whether or
20 not Clipper's use of them would make them public. Hallmark
21 uses its information in a way and its operational activities to
22 keep this information a trade secret. And under the assumption
23 this information is a trade secret, they've kept it secret.
24 Clipper's use of it wouldn't necessarily be worried about
25 keeping it as a secret.

1 Q Well --

2 A It's a difference between Hallmark using their own
3 information, information that they try to keep secret. And
4 Clipper saying, we have a license, we can go do what we want.
5 We can go compete with Hallmark with this information.

6 Q I'm not talking about competing, sir. You just made a
7 long statement about the notion that Hallmark would have the
8 information but Hallmark would keep it secret. And Clipper
9 would pay \$29 million, supposedly, for the information but they
10 wouldn't keep it secret, is that right?

11 A So let's look at, for example, the proprietary financial
12 information which is information that would enable Clipper in
13 its operation of RPG to know what Hallmark is charging
14 Walgreens versus what it charges CVS in different amounts. So
15 that would enable Clipper in operating RPG to go into those
16 stores and represent to those stores and say, well, this is
17 what Hallmark is doing with you this way and that way. Let's
18 work on that. We can do better.

19 Well, Hallmark doesn't use its information to go and
20 tell CVS what they're giving to Walgreen. So it's a difference
21 in how Clipper is going to use certain information rather than
22 how Hallmark is using it.

23 Q Sir, that's the second time you talked about the fact that
24 if Clipper knew what Hallmark was doing with its customers,
25 that the sales terms it has, what the prices would be, that it

1 could hurt Hallmark, right?

2 A That may be the second time I spoke of it, yes.

3 Q But you know, sir, that's not an issue in this case,
4 right?

5 A I'm not sure what you mean.

6 Q Let me read you Hallmark's interrogatory answer. Subject
7 to and without waiving these objections and its general
8 objections, Hallmark states that when Monitor had access to
9 Hallmark's terms of sale, Hallmark has no evidence at this time
10 that Clipper received any of Hallmark's terms of sale with
11 Hallmark's customers. Did you know that's the position
12 Hallmark took, sir?

13 A I think we discussed this in my deposition. My
14 understanding of terms of sales were different than the profit
15 margins and costs that were reflected in the presentation trade
16 secrets.

17 Q So you're talking about going in and knowing what profit
18 margins are but not going in and knowing what the deal Hallmark
19 has with the customer?

20 A I think the information that is in the presentation trade
21 secrets with respect to the pricing and the profit margins is
22 adequate to know how to undercut Hallmark.

23 Q Now, if the information becomes public, if it's not secret
24 then according to you it's not protectable, right?

25 A You know I'm not here to make legal opinions one way or

1 another on what is protectable, what is not. I'm not a lawyer.
2 I don't have the expertise or the scope to do so. And as I've
3 said in this case I was asked to make assumptions with respect
4 to that and I did.

5 Q Jeff, would you pull up page 60, starting at line 9,
6 please? Nine through, I'm sorry, 6 through 19.

7 Now, I'm going to take you to this page in a second.
8 It's one of the charts that we've looked at a bunch in this
9 case. But I asked you the question, so using that
10 understanding let's turn back to page 7 of the Greetings
11 Business Model 1329C that we were just looking at. And I'll
12 ask you, again, if the conclusion identified on page 7 was made
13 public by Hallmark voluntarily, would the slide still be a
14 trade secret in your view?

15 ANSWER: In general, I can't speak to whether or not
16 the overall characterization of your question but in general if
17 information is public information then I don't understand
18 public information to public, something that is directly public
19 in the totality and specificity of that information, then I
20 don't know how that's a trade secret.

21 That was your answer, sir, right?

22 A Yes.

23 Q And?

24 MR. GERMAN: The answer continues.

25 MR. MANCHEL: Your Honor.

1 THE COURT: If there is more of the answer, let's see
2 it.

3 MR. MANCHEL: Go down, Jeff, to the bottom, please.

4 BY MR. MANCHEL:

5 Q I do understand that public information can become, that
6 is incorporated into something else that is a trade secret
7 doesn't obviate the trade secret value of the thing that it's
8 incorporated into.

9 Let's talk about that for a second. This statement
10 right here, what you're saying by this statement is if I take
11 something from the public and I pull it into my private world,
12 the fact that a piece of my private world came from the public
13 still means I have a trade secret, right?

14 A You know you're asking me questions about what is and
15 isn't a trade secret. You asked me questions in my deposition
16 and I many times said I have no legal opinion about this. I'm
17 not an expert in this. You were asking lay interpretations and
18 I was doing the best to answer your questions in the
19 deposition. I'm not a legal expert. I don't purport to be
20 one. And I do not purport to say what is or isn't a trade
21 secret and when something that is secret becomes not secret.
22 That's not, it's outside of the scope and I didn't do that
23 here.

24 Q I appreciate that, sir. But this is something your lawyer
25 just asked to be read to the jury. I'd like to spend some time

1 on that?

2 A That's fine.

3 Q What you're saying here is if we take something from the
4 public and we bring it into a private work, as long as the work
5 stays private, the fact that it has a public piece in it from
6 the public doesn't mean that it's not a trade secret, right?

7 It's still private. That's what you're saying here?

8 A I said that is my lay understanding.

9 Q I understand.

10 A If I told you how an engine works and I say it wrong, I'm
11 wrong because I'm not an engineer and I don't build engines.

12 Q I didn't say you said that wrong.

13 A I'm just saying as a general fact you're asking me
14 questions that are legal interpretations and legal opinions
15 that I'm not here to make. I've never purported to make them.
16 I'm not purporting to make them. And that's not the analysis I
17 performed or the testimony that I've given.

18 Q And if something that is secret is released to the public
19 you understand that that's no longer secret, correct?

20 A No, I don't understand it's no longer secret. It may or
21 may not be.

22 Q Now, if parts of the presentations were found not to be
23 trade secrets, you could make adjustments in your damage
24 analysis, right?

25 A I did say that I could apportion in certain ways depending

1 on certain findings of the jury.

2 Q I'm going to try to keep it simple if I can. If it turns
3 out, if it turned out that parts of the presentations were not
4 trade secrets, you could adjust the numbers that you gave to
5 the jury this morning, right?

6 A I said that if it turned out that one or two or some set
7 of the presentations themselves then I could apportion amongst
8 the presentations, not within a presentation.

9 Q And you didn't make any of those adjustments, right?

10 A Well, there are no adjustments to make. I provided a road
11 map and a mechanism by which those could be made. The analysis
12 that I performed was done under the assumption that all of the
13 alleged trade secrets are found misappropriated and used.

14 Q No. I understand that. My question to you is if that
15 assumption proves wrong, you haven't given the jury a way to
16 change the numbers you used, correct? You didn't do that?

17 A I have done that in my report.

18 Q You have given alternate numbers for less than all of the
19 presentations being trade secrets?

20 A I've given a mechanism and it's in one of the schedules in
21 my report explains how to do that.

22 Q Now, Jeff, would you put up on the screen, please, 153,
23 line 6 through 10. And if you could also put up on the screen
24 at the same time, Jeff, page 151, line 8 through 12.

25 This is the testimony that you gave at your

1 deposition on top. It says, I understand that the
2 presentations would allow RPG to piggy back on Hallmark's new
3 marketing efforts. Do you see that?

4 I do.

5 Then you said RPG's knowledge that Hallmark would
6 spend its advertising dollars at the category level would allow
7 RPG to avoid spending its own marketing dollars on similar
8 initiatives.

9 Do you see those quotes, sir?

10 A I do.

11 Q You were told that by Wayne Strickland, correct?

12 A Yes, I was.

13 Q Now, is it really your opinion, sir, having looked at this
14 material that someone having the presentations at issue in this
15 case in 2005 would be able to piggy back on Hallmark's new
16 marketing efforts?

17 A You know, I don't have an independent opinion with respect
18 to that beyond my understanding from Mr. Strickland.

19 Q And is it true that if I had these presentations in 2005,
20 I would know what Hallmark would be spending its marketing
21 dollars on? Is that true?

22 A I'm sorry. I don't understand your question.

23 Q Looking at the second quote. Is that a true statement,
24 sir?

25 A Which one?

1 Q The one blown up there?

2 A Which page are you looking at, please?

3 Q That was page 153, lines 6 through 10.

4 A That is an understanding I have from Mr. Strickland.

5 Q Sir, what was the name of the ad campaign Hallmark did as
6 a result of these presentations?

7 A I believe at least one ad campaign was the Remembrance
8 Campaign.

9 Q I believe it's called Remembering. Does that sound right?

10 A All right.

11 Q That was the ad campaign that focused on getting people to
12 buy greeting cards as opposed to Hallmark cards, right?

13 A That's my general understanding about the campaign.

14 Q The Remembering Campaign was put out by Hallmark based on
15 the work that had been done by Monitor as reflected in some of
16 the presentations at issue in this case, right?

17 A That's my understanding.

18 Q But that ad campaign, the Remembering Campaign came out
19 before 2005, didn't it, sir?

20 A I believe it did.

21 Q It came out in 2002, didn't it?

22 A I believe it did.

23 Q And did anybody tell you, sir, we heard from Wayne
24 Strickland that the ad campaign only lasted for ten months when
25 it came out?

1 A I haven't had any access to any testimony in this case so
2 I wouldn't know that.

3 Q So in terms of the ad campaign that came from these
4 presentations, everybody knew what it was, right?

5 A Everybody may have known in a general sense that Hallmark
6 was advertising to buy cards.

7 Q Sir, you don't know of a single campaign, a single new
8 marketing effort based on the presentations that occurred after
9 2005, isn't that right?

10 A I'm not aware of, personally aware of any.

11 Q And you know that whatever was done before 2005 RPG would
12 know about it, right?

13 A RPG would have what was available to know publicly or
14 looking at what ads Hallmark was putting out there.

15 Q They would also know the reasons for it according to this,
16 isn't that right?

17 A In 2005?

18 Q Yeah.

19 A In 2005 they know the reasons for it.

20 Q They knew the reasons when it came out, right?

21 A Not necessarily.

22 Q Jeff, would you put up page 154, lines 1 through 13.

23 According to my understanding from Mr. Strickland
24 they would have an understanding of the overall strategy that
25 Hallmark was implementing and the detailed aspects of that

1 strategy.

2 QUESTION: Going forward?

3 ANSWER: Currently and going forward.

4 QUESTION: Do you mean past, currently and going
5 forward, right?

6 ANSWER: Well, whatever is past, it was past. They
7 would know what was done. They would know the reasons for
8 whatever was observed. They would know what was going on and
9 they would have insight into what's going on.

10 True statement, sir?

11 A Yes. What Mr. Strickland explained to me was that RPG by
12 having, in 2005 having these presentations would then be able
13 to go aha, well, that's why they did it. They were focusing
14 this way. Okay. Now, they did this and they've done this. So
15 they would be able to in 2005 looking at that road map where
16 before what they saw was a stop sign over here and path over
17 here. All of a sudden, now, they have the full map. They can
18 see where everything is going. This is why they did that.
19 This is where they're going next. They did this over here in
20 2002. Then they did this in 2003. And they have a plan and
21 likely they'll go over here going forward. That's what I'm
22 speaking to.

23 Q You just used the word aha which makes me believe you did
24 speak to Mr. Strickland because we heard aha moments a number
25 of times when he spoke. But the aha moment here, sir, occurred

1 in 2002, isn't that right?

2 A I've not spoken to Mr. Strickland. I have no insight into
3 any of the testimony that was done here. Aha is my word. If
4 he used it, good for him.

5 Q You did speak to Mr. Strickland about all this, that's
6 where you get it from, right?

7 A I spoke to him before I did my report.

8 Q I understand.

9 A You just said I spoke to him --

10 Q I said I believe you spoke to him because you both used
11 the aha?

12 A That's not what you just said.

13 Q But my question is, all of this aha, this aha moment
14 occurred in 2002 when the Remembering Campaign came out, right?

15 A No. This aha is RPG sitting there now, in 2002 they saw
16 this happen. The Remembering Campaign. Wonder why they did
17 that? You know, that's what they did. Now, in 2005 they get
18 this stuff and they see that's why they did it. They did it
19 because they were doing this and they're doing this now and
20 this is likely where they'll go in the future. So something
21 happened in the past, they had a question mark in their head
22 why are they doing it? Now in 2005 they get these materials,
23 they know. Their question is answered.

24 Q Do you know if any of that happened, sir? Just made a
25 full statement to the jury about what Clipper did or didn't do.

1 A This is --

2 Q Excuse me, sir. Do you know whether any of that happened?

3 A That's not the issue of what the analysis I performed.

4 This is a question of at the hypothetical negotiation if they
5 had this information in hand and they knew what the information
6 would do, what benefit would they anticipate getting from it.

7 It's a different situation. It's this hypothetical thing and
8 it's a construct that's putting everybody back at a certain
9 point in time before this happened and saying, we have open
10 books. We know what is going on. What is this worth? What
11 actually happened is different than what is going on at that
12 negotiation.

13 Q Well, we weren't talking about the negotiation, sir. We
14 were just talking about the presentations. So let's be clear
15 for the jury. But all the stuff you said is hypothetical,
16 right?

17 A It's what, the value of what this information would be.

18 Q Is it hypothetical, sir?

19 A Yes.

20 Q Now, you also are asking the jury on behalf of Hallmark to
21 award cost savings that were supposedly avoided by Clipper,
22 right?

23 A I've identified cost savings that otherwise Clipper would
24 have had to incur funds to generate comparable information.

25 Q I just want to, I think I just said that. You're asking

1 this jury to award Hallmark damages based on cost savings
2 supposedly avoided by Clipper, correct?

3 A What I've done, I was asked to do is perform an analysis
4 and I provided the jury with that analysis that I performed of
5 what costs Clipper would have otherwise incurred.

6 Q In fact, sir, you did nothing to determine if Clipper
7 would be the one saving any costs, isn't that right?

8 A My analysis is that Clipper would have, at the time
9 Clipper would have had to do this. There was no other entity
10 at the time. I've done no analysis beyond that.

11 Q Sir, my question to you was, you did nothing to even
12 determine if Clipper would be the one saving the cost, isn't
13 that right?

14 A No. I just said Clipper at the time would have initially
15 been the one to have to spend the money to do this.

16 Q Jeff, would you put up, please, page 81, lines 5 through
17 13.

18 QUESTION: Well, who did you think was going to incur
19 the costs, sir?

20 With respect to this, it didn't, under the assumption
21 that I was asked to operate under it didn't matter since I was
22 asked to assume that Monitor Clipper Partners would be liable
23 whether they paid it, Fund II paid it or RPGI paid it, whoever
24 paid it. That was the assumption I was asked to work under and
25 that's what I did.

1 That is the only testimony you offered on this issue
2 at your deposition, isn't it, sir?

3 A I'm not sure. I would have to look back at the whole
4 deposition.

5 Q I asked you a pretty simple question. Who did you think
6 was going to incur the cost? And your answer was as I
7 represented before lunch, it didn't matter. That's the truth,
8 sir, too, it didn't matter to you, did it?

9 A No. What I was getting at was it didn't matter in terms
10 of my analysis at the end of the day where the final dollars
11 came from. There was a question of reimbursement and I did not
12 do any analysis of reimbursement.

13 Q Sir, Clipper had a contract with Fund II, isn't that
14 right?

15 A Clipper had a lot of contracts. I believe they had one
16 with Fund II.

17 Q And you know the contract showed who would pay the
18 expenses, right?

19 A I believe there was language about reasonable expenses.

20 Q Sir, even though the contract showed who would pay the
21 expenses, before you gave your opinion in your report and at
22 your deposition, you did not even attempt to look at the
23 contract, isn't that right?

24 A No, I don't think I didn't attempt to look at the
25 contract. I did not attempt to interpret the contract.

1 Q Jeff, put up page 78, lines 8 through 21.

2 ANSWER: My understanding is Clipper did the due
3 diligence and during the due diligence period Clipper would
4 have incurred those costs.

5 QUESTION: Well, before you reached that
6 understanding did you attempt to look at the contracts under
7 which Clipper was operating?

8 ANSWER: No, I did not. And as I stated earlier I
9 was asked to work under the assumption that the legal
10 distinction between the various Clipper entities, Clipper
11 L.L.C., Fund II, I believe, RPGI, etc. were not relevant for
12 purposes of my damages calculation that Monitor Clipper
13 Partners L.L.C. and Mr. Doctoroff would be liable for any
14 damages in this case.

15 That's what you said, right, sir?

16 A Yes. And I did say no --

17 THE COURT: Just a moment.

18 MR. GERMAN: Excuse me. I think the next question
19 and answer are right on point and clarify. I'm asking for
20 context permission to read.

21 THE COURT: Let's see the next question and answer,
22 please.

23 MR. MANCHEL: Well, I'm not asking you that, sir.
24 I'm asking you specifically about avoided costs. Did you look
25 at the contracts? There are two contracts that provided

1 specifically the costs incurred by Clipper will be reimbursed.
2 Did you review those contracts?

3 ANSWER: I believe I've seen those contracts.

4 A Yes. And that's as I said, I didn't do an analysis of the
5 contracts to try to interpret them. I did see the contracts.

6 Q Sir?

7 A If I may, on lines, I believe, 8 through 10 of page 78 and
8 my answer to your question, your question was on 67, what do
9 you base your conclusion that Clipper would have incurred these
10 costs? And my answer was, my understanding is Clipper did the
11 due diligence and during the due diligence period Clipper would
12 have incurred these costs.

13 So you had asked me before if there was somewhere
14 else in my deposition where I talked about who was going to
15 incur the costs, so that's right there.

16 Q Sir, if you.

17 Jeff, would you go, continue down on this page. If
18 you go to page 80 the answer to your question. Page 80, line 3
19 through 11.

20 As I stated it's a legal opinion that I'm not
21 prepared to make here. I was asked to work under the
22 assumption that for purposes of my damage calculation that
23 Monitor Clipper Partners was responsible for all costs in this
24 particular situation, avoided costs that would be incurred by
25 any of those other entities.

1 Is that true?

2 A Yes. This is, you were asking a lot of questions. This
3 is a timing issue. And the timing issue is as follows.
4 They're in due diligence period. Monitor Clipper is the one,
5 the only party there. Monitor Clipper needs to do this work to
6 determine what they want to do. Monitor Clipper would be the
7 one, if these items were replicable, would be the ones to
8 replicate it and they would incur the costs.

9 There were lots of questions about reimbursement
10 after the fact. And I said I didn't do anything to evaluate
11 the reimbursement. You were asking questions about, well, if
12 so-and-so had to pay this back, then they incurred the cost. I
13 said, look, I didn't do anything past that first point. And I
14 didn't.

15 Q You're telling the jury that was your testimony during the
16 deposition, sir?

17 A That's, I believe what I'm answering for you here.

18 Q Sir, what you said was you believed that they were
19 incurred then you knew they were reimbursed, isn't that right?

20 A I didn't say I knew they were reimbursed. You were
21 telling me they were reimbursed.

22 Q I thought you read the contract?

23 A As I said, I didn't interpret the contract.

24 Q So you read it but you didn't interpret it?

25 A That's not my scope of understanding or work.

1 Q Let's take a look at some of the costs that you claim that
2 someone said. Would you put up Plaintiff's 547A, please?

3 A Is this one I have up here?

4 Q You were given it, yes.

5 MR. GERMAN: Schedule B2.

6 BY MR. MANCHEL:

7 Q This identifies the research costs, correct, sir?

8 A Yes. This is the information I was provided by
9 Mr. Maynard.

10 Q My next question is, this is Hallmark provided
11 information, right? You didn't go out and do this yourself?

12 A Did not go out and do this myself.

13 Q And Hallmark told you what to assume in terms of the costs
14 to use in your analysis. I understand you used them in various
15 ways but the underlying costs that you used, you were told by
16 Hallmark to use them, correct?

17 A I was told by Hallmark what the costs of the research that
18 they identified that were used or would be, were used to
19 generate the syntheses and summaries of research that was in
20 the presentations that these are the costs that they incurred
21 to generate that.

22 Q That was my next question. My next question was, they
23 told you that the reason you should use all of these costs was
24 you were to assume that all of the research identified by
25 Hallmark was, in your words, synthesized into the

1 presentations, correct?

2 A Well, I re-characterized the circumstance. I asked them
3 what research would be, did they have to do to yield the
4 syntheses and summaries that were in presentations. They told
5 me this is what it was.

6 Q Sir, did you assume for purposes of your analysis that the
7 information reflected on this schedule is synthesized into the
8 presentations?

9 A That was an assumption, yes.

10 Q And that assumption was given to you by Hallmark, correct?

11 A That was their answer to the question and I took that
12 answer, yes.

13 Q Is that the assumption given to you by Hallmark, sir?

14 A Well, assumption, it's an assumption I made based on this
15 was the answer to the question and this is what I used.

16 Q Let's take a look at some of these research expenses that
17 Hallmark told you to use.

18 It's a little hard to see, Jeff, but about halfway
19 down there is an entry for the purchase diary 1995. Can you
20 highlight that? Let's just focus, let's look at the internal
21 payroll costs.

22 There are diary study costs that are built into your
23 analyses, correct?

24 A These are the costs that were used in my analysis.

25 Q And they include what we've called here the diary study

1 costs, correct?

2 A That's correct.

3 Q And the diary study as we heard the other day was the
4 research mechanism that Hallmark used where all sorts of stuff
5 went out to households. It came back. Then it was morphed
6 into research and conclusions and recommendations, right?

7 A Well, morphed isn't the right word. When you go out, you
8 do a survey, you get data, you ask people questions. You get
9 answers to those questions and then there are people that
10 understand how to compile that information to get the specific
11 nuggets out of it that they are looking for.

12 Q And the diary studies that were used and the expenses that
13 are here are diary studies from 1993 up until 2000, correct?

14 A That does appear what's is on there, yes.

15 Q Now, in those diary studies, in each of those diary
16 studies there were a number of things that were researched,
17 correct?

18 A I believe so, yes.

19 Q Well beyond greeting cards, right?

20 A There were other things beyond greeting cards.

21 Q There was research on cups and napkins and ornaments?

22 A You know, I don't have a complete recollection but I know
23 there was more than greetings, yes.

24 Q Research on dinnerware, balloons, and party needs?

25 A As I say, I don't have the diary in front of me so I can't

1 say exactly what it was but there was more than greetings.

2 Q In fact, there was, obviously, research on greeting cards,
3 right?

4 A Yes.

5 Q But even though greeting cards was a piece of each diary
6 study, for the purposes of your work you included 100 percent
7 of the costs of each diary study, didn't you, sir?

8 A These were the costs that I was provided.

9 Q I understand they were the costs you were provided, sir,
10 but did you just pass them on without thought?

11 A No, I didn't pass them on without thought.

12 Q So here's my question. You understood that the diary
13 studies looked at all sorts of things besides greeting cards,
14 correct?

15 A That's, the characterization would seem to suggest that
16 the diary studies looked as much at balloons or cupware as it
17 did greetings and that's not my understanding. My
18 understanding is that the vast majority of the diary study
19 would be greetings and there were other things in there as
20 well.

21 Q Well, I didn't suggest anything, sir. My question was
22 very simple. Each diary study looked at a bunch of things in
23 addition to greeting cards, correct?

24 A Yes, it did.

25 Q And even though each diary study looked at a bunch of

1 things other than greeting cards, you incorporated into your
2 damages, because Hallmark told you to do it, 100 percent of the
3 costs of each diary study, correct?

4 A I wouldn't characterize it that way. What I did and,
5 again, this isn't to say that Clipper was going to do exactly
6 what Hallmark did. What my analysis was, was to say, well,
7 Clipper needs to come up with comparable syntheses and
8 summaries of research. So what is in the presentation has
9 these nuggets we talked about. How are they going to get those
10 nuggets? And what is the cost that Clipper is going to incur
11 to go out and do that? I said, what is the best proxy for
12 that? I don't know. I'm not an expert in market research.
13 I'm not going, I couldn't undertake a study, say, okay, I've
14 got this and what exact things are they going to have to do?
15 So I said, what is my best estimate of what this amount is?
16 Well, Hallmark is in the greetings industry. Hallmark is the
17 biggest player in the greeting industry. Hallmark has been
18 doing this for years upon years upon years. Hallmark has a
19 huge research department. Hallmark, it's reasonable to
20 suggest, is going to be able to do this kind of research at the
21 lowest cost of anybody to get this kind of research because
22 they've done it and they're building upon past research. And
23 so in terms of, well, if this is what it cost Hallmark to do,
24 is this reasonable to suggest that this amount is what it would
25 cost Clipper to do? I think it's conservative to suggest this

1 is what it would cost Clipper to do.

2 Q It's a simple question, sir. Did you include in your
3 analysis a hundred percent of each of the diary costs?

4 A I did.

5 Q And did you understand at the time you included in your
6 analysis 100 percent of each of the diary costs that, in fact,
7 each diary study addressed things other than greeting cards?

8 A I did.

9 Q Did you understand that? Thank you. Now, Hallmark
10 actually misled you about the diary study costs, didn't it?

11 A I don't know that they did.

12 Q Well, when you calculated the research costs for the diary
13 study, in each diary study from 93 on there was an item that
14 was called internal payroll costs, wasn't there?

15 A Yes.

16 Q And you assumed when you did your analysis that those
17 internal payroll costs were actual, isn't that right?

18 A I don't know that I assumed that they were actual or not.
19 There is a research department at Hallmark and as I understand
20 it these were allocated costs.

21 Q You understand they were allocated costs, sir?

22 A They were allocated in terms of the internal payroll
23 costs. This is an allocation of salaries, for example, for an
24 individual.

25 Q Sir, when you calculated the internal payroll costs, you

1 calculated your damages figures, you believed that Hallmark had
2 identified the people who were assigned to work on the diary
3 study and determined how many hours those people worked and the
4 actual cost that Hallmark incurred, isn't that right?

5 A No. I didn't have that level of detailed assumption to
6 it. These costs were provided to me.

7 Q Jeff, would you pull up, please, page 93, lines 10 through
8 18.

9 QUESTION: So your assumption when you prepared the
10 report we're looking at was that Hallmark had figured out the
11 people who were assigned to work on the diary study, how many
12 hours they had done and then the cost that was incurred as a
13 result?

14 That was the assumption. But also with the
15 understanding from Hallmark and my discussions with Mr. Maynard
16 that while there were payroll costs in there, they are
17 generally understated.

18 A Yes. If I could add the previous question and answer in
19 here as context because you asked me, did you understand how
20 they were calculated?

21 And I said, I think it was more of an assumption that
22 internal payroll costs is some kind of allocation for the
23 individual people's time to an activity. And at their cost to
24 the company for their salary and benefits is usually a way the
25 company uses such allocations.

1 Q But it was an allocation of actual time, sir. You thought
2 they were actual costs, didn't you?

3 A These are, if you have somebody that's being paid \$50,000
4 a year for a job and you have to say, well, now, I know that
5 they did four different activities over their time doing it.
6 How are you going to allocate their time? Lot of companies
7 have different divisions, different divisions have individual
8 profit and loss for a division. So I've got company A and it's
9 got divisions 1, 2, 3, and 4. And you know the head of the
10 division 3, he's got his own profit and loss statement. His
11 bonus is based at the end of the day on how good my company
12 did. And he has how much revenue came into my division and he
13 has how much cost has to be, go against that revenue. And it's
14 like, well, there was somebody that worked some time. He's got
15 a \$50,000 salary. The company said we have an allocation
16 mechanism. We're going to tell you how much of that person's
17 50,000 goes against your P and L, your revenue to determine how
18 good your division, division 3 did and how much of a bonus you,
19 Bob, you get for running division 3. That's an allocation.
20 That's how it works in business whenever there are multi
21 divisions and there are individuals who work across them. It's
22 my understanding that's what happened here.

23 Q Jeff, would you pull up, please, page 94, lines 14 through
24 25. Then line, page 95, lines 1 through 4, 95, lines 1 through
25 11.

1 QUESTION: You, but you took it as an assumption that
2 those were costs actually incurred, didn't you?

3 ANSWER: Yes.

4 QUESTION: Okay. And if I told you, sir, that those
5 costs weren't actually incurred, understated or not, would that
6 be a concern to you for purposes of your damages analysis?

7 ANSWER: I'd have to ask Mr. Maynard to determine
8 what the actual costs incurred were and determine whether or
9 not those were, continue to be understated.

10 QUESTION: Because you want to put in your analysis
11 actual costs, correct?

12 ANSWER: To the extent that my understanding of what
13 I was looking at were actual costs, I'd like to have complete
14 actual costs. That's not necessarily the case that I would
15 need actual costs for purposes of determining the, whether or
16 not this is a reasonable proxy for the avoided costs to Monitor
17 Clipper to the extent that that would be a reasonable
18 approximation of what it would take staff to manipulate and
19 address the research that's in here.

20 So I ask you, again, sir. Did you believe that you
21 were given actual costs when you did the diary study?

22 A I believe --

23 Q To include the diary study?

24 A I believed that what I was being given was Mr. Maynard's
25 correct calculation of what those costs were.

1 Q Now, Jeff, would you pull up, please, Defendant's 604.
2 Just highlight the top, please.

3 This is a sample, sir, of what Hallmark gave us to
4 show us what a diary study survey looks like.

5 And, Jeff, highlight.

6 Thank you for continuing to participate in my study.
7 Please answer for these items. Pre-printed greeting cards,
8 gift wrap and accessories, party goods, balloons, invitations
9 or disposal dinnerware, cups, napkins etc. ornaments. Do you
10 see all of that?

11 A I do.

12 Q That's what we were talking about before. We heard
13 testimony during the week that when these surveys go out they
14 go out to address a number of issues, right?

15 A You know I'd have to look at a diary study from the years
16 that are at issue to know exactly what, what is being asked in
17 those years. This one is talking about 2005. And in 2005 they
18 were definitely asking about these items.

19 Q Right. And this is what we got from Hallmark to show us
20 what a diary study looks like. You know that in the early
21 years it might be in 1993, they're not looking at cups or
22 napkins but can you agree with me, sir, that in each diary
23 study year to the best of your knowledge the survey goes to
24 things other than just greeting cards?

25 A I believe the survey went to things other than greeting

1 cards. I don't know all the items that were in each year's
2 survey.

3 Q Now, did you ever say to Hallmark, in words or substance,
4 can you help me out here and make sure that in my analysis I
5 only use the cost of the diary studies for greeting cards?

6 A No, I did not.

7 Q And you know, sir, that if you asked that, Hallmark could
8 have done it, isn't that right?

9 A I don't know that.

10 Q Well, sir, you know, and we heard testimony this week what
11 Hallmark does with the cost of each diary study is Hallmark
12 divides it up internally in Hallmark, correct?

13 A I'm not sure I have that depth of understanding.

14 Q Well, sir, you know that Hallmark takes the cost of the
15 whole diary study and then spreads it out amongst its internal
16 units, don't you?

17 A They probably do that if it's the same discussion as I was
18 just doing with company A and division 1, 2, 3, 4.

19 Q Sir, it's a simple question. Do you know that when
20 Hallmark does a diary study Hallmark takes the total cost of
21 that diary study and allocates it to each division that has a
22 piece of the diary study? Not the same amount. Different
23 amounts. But it does it, right?

24 A I think it does.

25 Q So for this diary study, as an example, we could find out

1 from Hallmark, if we wanted, how much the division that handles
2 gift wrap and occasions, what expense of this diary study
3 belongs to that division, right?

4 A I don't know. That may be possible.

5 Q Well, do you have any reason to think it's not, sir?

6 A I just don't know.

7 Q Okay. We could know for party goods, balloons,
8 invitations and disposable dinnerware, what expense for that,
9 too, right?

10 A I just don't know.

11 Q But you never, even though you knew the diary studies
12 covered things beyond greeting cards and even though you knew
13 that Hallmark could tell you the allocated price of each unit,
14 you never asked for it, did you?

15 A I asked for the costs that were, that Hallmark incurred to
16 create the research that was synthesized and summarized in the
17 presentations. This is what I was given. And as I said, I
18 felt that this was a reasonable proxy for what Clipper would
19 have had to incur because of the fact that Hallmark costs would
20 be the lowest possible to do this.

21 Q Sir, the other part of your cost savings argument concerns
22 what Hallmark supposedly paid Monitor for the presentations at
23 issue in this case, correct?

24 A Yes.

25 Q And the Monitor charges that Hallmark told you to use were

1 wrong, weren't they?

2 A I don't know that.

3 Q Would you put up, please, Plaintiff's Exhibit -- which I
4 think we have as Defendant's Exhibit 1256. Could you highlight
5 the charges, please, Jeff, the body of it?

6 Schedule B1. The avoided costs, consulting fees, the
7 \$5 million figure. Do you see that?

8 A I do.

9 Q When you first did your report that number was a lot
10 higher, wasn't it?

11 A Yes. It included the cost of the INT project.

12 Q I'll get there, sir. When you first sent over your report
13 to defendants you were asking or arguing that over \$7 million
14 had been paid to Monitor for the presentations at issue in this
15 case, correct?

16 A My first report had that number in it.

17 Q Is that a yes?

18 A Well, my first report was based on my understandings from
19 discussions with Mr. Strickland about what consulting projects
20 were represented in the five presentations. And my
21 understanding at that time was that the totality of the INT
22 project was also included in there. That was information I was
23 provided by Hallmark and that was included in my report.

24 Subsequent to my report I was informed that was
25 incorrect and that the INT project was not represented in the

1 five presentations so I correctly removed it from my
2 calculation.

3 Q Well, let's walk through this because I didn't ask those
4 questions. You, your first report said that the defendant
5 should pay 7.3 million, approximately, for Monitor charges,
6 correct?

7 A That number was in my first report.

8 Q And when it was in your first report it was in your first
9 report to argue that \$7.3 million should be paid by my clients
10 for Monitor charges, correct? That's the reason it was in your
11 report?

12 A You know, I will also point you to in my report on page 5,
13 paragraph 13. The opinions expressed in this report are based
14 on facts currently known to me. I reserve the right to rely
15 upon additional information that becomes available to me after
16 the date of this report and if necessary supplement and or
17 modify my opinions accordingly. What I do that is normal
18 standard procedure for an expert. We can only deal with what
19 we have and the information we have at the time. If that
20 information is found to be incorrect or if there is different
21 information, I change my opinion. I'm not here to do anything
22 but come up with the correct answer.

23 Q The only information that came to you after you did your
24 first report, sir, was Hallmark told you that it couldn't put
25 the 2.275 million figure in because it came from the wrong part

1 of the BMR, isn't that right?

2 A They provided me with information that they had mistakenly
3 told me that the INT project was represented in the five
4 presentations.

5 Q So the answer to my question is, yes, they told you that
6 they made a \$2.7 million mistake with regard to what the
7 presentations were at issue in this case, correct?

8 A That's correct and I changed the analysis.

9 Q Well, we'll get back to the \$5 million figure in a second
10 but I want to, so now, now you're saying and this is what we
11 heard this week, now you're saying that the cost avoided in
12 terms of the Monitor fees are really \$5 million, correct?

13 A The opinion I have at this point is that they are
14 5 million.

15 Q And of the \$5 million, 3.8 million comes from what we call
16 here the greetings module or greeting side, right?

17 A Yes.

18 Q That's a hundred percent of the fees and costs that
19 Monitor charged Hallmark for the greetings portion of the BMR,
20 correct?

21 A Yes.

22 Q And that, according to you, was suppose to be charged for
23 three presentations, correct?

24 A I have the basis for that is my discussions with
25 Mr. Strickland.

1 Q I didn't ask you the basis, sir. I just asked you, isn't
2 it true that you're seeking to charge as part of your damages
3 analysis \$3.8 million for the three greetings presentations?

4 A My calculation of the costs that Clipper avoided incurring
5 with respect to consulting services that they would have had to
6 replicate in order to arrive at the same recommendations and
7 conclusions that were reflected in the five presentations is
8 5 million. 3.8 comes from the greetings project.

9 Q Jeff, would you pull up Plaintiff's 487, please?

10 These, the presentations attached to this e-mail were
11 the presentations that you're charging the \$3.8 million from
12 the greetings, correct?

13 A You know, your verbs that I'm charging, I'm not charging
14 anybody anything. What I've done is I did an analysis of what
15 costs Clipper avoided incurring. I'm not here to charge
16 anybody. So your verb is incorrect. But what I did was based
17 on an understanding that the totality of the greetings project
18 for which Hallmark paid \$3.8 million to Monitor Consulting was
19 reflected in the presentations.

20 Q Again, sir, we'll get to that. Step No. 1 is the
21 \$3.8 million claim that Hallmark is advancing against my
22 clients for greetings concerns the three attachments to this
23 e-mail, correct? The greetings presentations, right?

24 A Can you show me which of the three presentations?

25 Q Sure. OEC discussions for greetings?

1 A Yes.

2 Q Now, you know, though that there was more work done by
3 Monitor than just these three greetings presentations, isn't
4 that right?

5 A No, I don't know that.

6 Q Sir, are you sure that these three presentations do not
7 constitute 100 percent of Monitor's greetings work?

8 A There were other presentations that were prepared
9 throughout the course of the greetings project. And it's my
10 understanding from my discussions with Mr. Strickland, which
11 are the basis of my opinions here, that the totality of that is
12 reflected in the greetings presentations that are amongst the
13 five.

14 Q So, again, let's break this down for the jury. No. 1, it
15 is true, isn't it, sir, that the three greetings presentations
16 according to you are only some of a large number of other
17 presentations, correct?

18 A That is correct.

19 Q No. 2, you actually saw that some of these other
20 presentations were done after December of 2001, correct?

21 A I believe there were presentations that may have been
22 after December 2001.

23 Q No. 3, you had all of those presentations in your
24 possession, correct?

25 A I did.

1 Q And, No. 4, you claim that Wayne Strickland told you that
2 even though there were a large number of other presentations
3 including presentations done after December of 2001, all
4 \$3.8 million for greetings should be argued as damages because
5 no other work was done after December 2001, correct?

6 A Well, we were going fine there until the word argue came
7 out. I sat down, actually a couple times, with Mr. Strickland.
8 And I sat there, I said, well, look, I've got other
9 presentations. He said, I know you've got other presentations.
10 There was stuff but nothing in those other presentations wasn't
11 in these. I said, look, I actually see that there are some
12 payments that occurred after December 2001 that say they went
13 to the greetings project. He said, the work was done.
14 Greetings was over and if there were payments they were related
15 to the fixed fee and just an allocation of that fixed fee over
16 a certain time period. That was his representation to me and I
17 took that representation.

18 Q We'll get to invoices in a second, sir. Right now I'm
19 just talking about work. So my question to you is, Wayne
20 Strickland told you that even though there were a large number
21 of other presentations including presentations that were done
22 after December of 2001, 100 percent of all greetings work
23 should be charged in this analysis because, in fact, no work
24 was done after December of 2001, correct?

25 A We get close to correct until you get to the shoulds and

1 would. Mr. Strickland didn't tell me what to do in my damage
2 analysis.

3 Q He told you --

4 A Mr. Strickland told me that all of the work on greetings
5 was done as of that date and all of the work was reflected in
6 those presentations. That's what Mr. Strickland told me.

7 Q But I want to be clear for the jury. He told you all the
8 work was done as of this date, right? This is the last of the
9 presentations, December 12, 2001?

10 A I believe so.

11 Q So he told you all the work was done by then. But, in
12 fact, you saw a large number of other presentations before and
13 after December of 2001, correct?

14 A You know large, there were presentations, certainly more
15 presentations before. I don't remember how many there were
16 after.

17 Q Did you know, sir, that Mr. Strickland was reassigned off
18 of the BMR project in January of 2002. Did you know that?

19 A No, I did not.

20 Q Did you know that Don Hall testified that the BMR work
21 didn't end until June of 2002?

22 A No, I did not.

23 Q Jeff, would you pull up Plaintiff's 488, page 7, please.

24 This is the presentation that someone at Hallmark
25 told you came from what is called the integration side of it,

1 correct?

2 A Initially, they did.

3 Q Sir, in your first report, you did a big report then kind
4 of a much smaller report, correct? Supplemental report?

5 A Yes. Pages don't matter. I did a report. And in the
6 process of preparing my report I discussed all these issues.
7 And I asked what portions of the BMR project were represented
8 and that's what I was told. And subsequent to that report I
9 was told that was an incorrect assignment and I changed it.

10 Q I'll get there, I promise. Part 1 of the story is you
11 were told by Hallmark that that document came from what was
12 called the integration portion of the BMR, correct?

13 A That's correct.

14 Q And Hallmark then told you, do you remember how many pages
15 were in this report, sir?

16 A Not many.

17 Q If I suggested to you 14, would that sound about right?

18 A Yes.

19 Q So Hallmark told you that because this 14-page
20 presentation was supposedly misappropriated and used and it
21 came from the integration portion of the BMR, Hallmark told you
22 that you should use in your damages analysis 100 percent of all
23 of the costs of the integration side, isn't that correct?

24 A Again, they didn't tell me what I should use but I asked a
25 number of times what was reflected. That is what they told me

1 so that is what I used.

2 Q I think I just said that but let me just be clear. You
3 were told three things by Hallmark regarding this document.
4 You were told, No. 1, it came from integration, correct?

5 A Yes.

6 Q You were told, No. 2, that 100 percent of integration fees
7 and charges were \$2.275 million, correct?

8 A Yes.

9 Q Then you were told that that's the expense that you should
10 use for this document in your analysis, correct?

11 A Again, that last piece, what I was told was that this
12 document reflected the totality of the integration project and
13 that's what it did and that's what I used.

14 Q Jeff, would you put up Defendant's 1256, please? Page 9.

15 Now, it's a little hard to see.

16 You can pull that back, Jeff, please. Highlight the
17 column that shows the integration, please.

18 This is the chart that Hallmark prepared for you,
19 correct, sir?

20 A Yes.

21 Q And this is the chart that I identified the document we
22 just looked at as coming from integration, correct?

23 A That's correct.

24 Q And once it was identified as coming from integration, the
25 2.275 figure was used, correct?

1 A Yes. Well, I would say that's not how it was used. I
2 asked Mr. Strickland what portion of the INT project is
3 reflected. He said all of it.

4 Q And, again, he said two things. No. 1, it's in
5 integration. And, No. 2, it's all integration?

6 A That's right.

7 Q So you realized that you had to drop the \$2.275 million
8 figure after you read Clipper's expert report, isn't that
9 right?

10 A Well, after I read Clipper's expert report and reviewed
11 more information about the INT, more information than I had
12 seen, I went back to Mr. Strickland and I said, I'm not sure
13 about this. This doesn't look right. I know what you told me
14 but I want you to go back and look at this because it doesn't
15 look right. And after I asked to go back and look at it again
16 it came back that, no, that was a mistake. And what we told
17 you was a mistake. And what I did was, okay, if what you told
18 me is a mistake then this number is incorrect in my report and
19 I changed it.

20 Q So, again, your answer to my question is, yes. After you
21 saw Clipper's expert report, you realized this was a mistake
22 and you went and changed it, right?

23 A No. I just gave you, I can give you, again, after I saw
24 Clipper's expert report, I saw information that I wasn't aware
25 of. And I went back to Hallmark and to Mr. Strickland and I

1 said I'm not sure about this, this doesn't look right. I know
2 what you told me but could you go back and look at it again.
3 And they went back and looked at it again and then it was
4 changed. The impetus was Clipper's expert report. And then a
5 series of events occurred which culminated with me being told
6 that was a mistake and so I changed it.

7 Q Jeff, would you pull up, please, Serwin 121, line 7
8 through 25.

9 ANSWER: Well, I was told, I was told by Mr. Maynard
10 and Mr. Strickland, I don't know that they were the first
11 people to tell me.

12 Well, who were the first people to tell you?

13 I may have been told that by counsel.

14 And when were you told?

15 This was after Mr. O'Connell's report.

16 And Mr. O'Connell was a defense expert, correct?

17 A Yes.

18 Q This was after Mr. O'Connell's report was submitted and
19 the process of preparing for my deposition and reviewing
20 Mr. O'Connell's report, I said, you know, I brought this issue
21 up with you guys and you told me one thing and I'm looking at
22 what Mr. O'Connell says and I want to be sure that I have a
23 correct understanding. And it came back to me that we have
24 looked at this again and that's not correct. That's what
25 happened, isn't it, sir?

1 A I believe that's what I just told the jury happened.

2 Q Well, no, sir. I'm sorry?

3 A That I had asked about this before my report. I was told
4 one thing. Then Clipper's expert report came out and I said,
5 wow. I'm seeing this. Can you go back and look at it again?
6 They went back and looked at it again. They came back and said
7 it's different. I'm not sure what is different from what I
8 said in my deposition.

9 Q What is different, sir, is that the reason you spotted the
10 mistake is because you got the expert report and you were about
11 to be deposed and you were being prepared by counsel, isn't
12 that right?

13 A No.

14 Q Isn't that what it says right there?

15 A No.

16 Q After Mr. O'Connell's report I took the issue up with you
17 guys, counsel told me?

18 A No. Where does it say counsel preparing for my
19 deposition?

20 Q It says right there, counsel preparing for my deposition?

21 A Where does it say counsel preparing for my deposition?

22 Q It says right there. Line 15. And in the process of
23 preparing for my deposition.

24 Line 10, who were the first people to tell you?

25 I may have been told that by counsel?

1 A Yes.

2 Q That's what happened?

3 A Well, Mr. O'Connell's report came out just prior to my
4 deposition.

5 Q Now --

6 A That is a stage of events. Yes, I'm preparing for my
7 deposition. I'm reviewing Mr. O'Connell's report and I'm
8 asking these questions.

9 Q And even after you were told the \$2.275 million number was
10 wrong, you still did nothing to check that number when Hallmark
11 sent it to you, again, isn't that right?

12 A To check which number?

13 Q The \$2.275 million number, isn't that right?

14 A Why would I check it again? I took it out.

15 Q Well, no, what you did was, you sent over a revised and
16 updated schedule, didn't you, sir? We talked about this at the
17 deposition. Do you remember that?

18 A Oh, there was a mistake on the schedule.

19 Q Let's walk through this slowly. You sent over what you
20 believed was a revised schedule that had the same mistake on
21 it, again, isn't that right?

22 A There was one of the schedules, the schedules I sent over
23 had new numbers and the numbers did not have 2.275. There was
24 an exhibit that showed, I think we just looked at it with that
25 long stretch and it said the INT and it put a particular set of

1 slides into INT. When I prepared those set of schedules, I
2 didn't flip that one. I missed. But the numbers were changed.

3 Q What you did, sir, in your words, you got the schedule
4 from Hallmark and you stuck a header on it, quote, unquote,
5 stuck a header on it then you passed it along, isn't that
6 right?

7 A Can you show me where that is?

8 Q Jeff, pull up page 123, lines 7 through 11.

9 That's the mistake you're talking about, right?

10 A That particular schedule, yes, that one is not my
11 schedule. That was provided to me by Hallmark. It's part of,
12 I mean, it's part of my report but it came from Hallmark and
13 so, yes, there was a mistake.

14 Q Wait. It is your schedule. You just had Hallmark prepare
15 it, correct? But it's your report, right?

16 A It's my report and there was certain information that I
17 relied on in my report and that was one of the things I relied
18 on. That information came from Hallmark. I don't have the
19 ability to say which piece of information in any of the
20 presentations goes to which BMR project. They were the ones
21 who told me that. That is prepared for me.

22 Q All you had to do was look at the schedule say, hello,
23 Hallmark, it's still being identified in integration. Isn't
24 that right?

25 A Well, you know, that would have been a great thing if I

1 had done that and we were rapidly trying to get this out the
2 door and there was a mistake made.

3 Q \$2.275 million at stake for my clients, sir, and you're
4 rapidly trying to get it out the door?

5 A You can ask your experts about trying to get reports out
6 the door. There are deadlines and the correct number was made.
7 The 2.275 was taken out. This particular schedule I made a
8 mistake on. It's a typo.

9 Q Now, let's take a look, Jeff, pull up Plaintiff's 487,
10 please. And page 203.

11 Now, this is another document that the subject of
12 your damages, included in, costs included in your damage
13 analysis, right?

14 A The channel, yes.

15 Q This is the channel. Hallmark is seeking \$1.2 million as
16 a result of just this document, correct?

17 A Well, Hallmark is seeking \$1.2 million with respect to the
18 cost that Clipper avoided incurring and would have had to incur
19 to come up with comparable recommendations and conclusions that
20 were in here.

21 Q Sir, in plain English, that's the only document that
22 you're asserting comes from the channel analysis, channel side,
23 correct?

24 A That's the only document I was told that came from the
25 channel side.

1 Q Just for that document Hallmark is looking for
2 \$1.2 million in damages, correct?

3 A It's not just for the one document. The question is, what
4 would the cost have been to Clipper to go out and achieve
5 through consulting services the same recommendations and
6 conclusions that are reflected in this document.

7 Q Now, you were told that this document comes from channel
8 by Wayne Strickland, correct?

9 A Yes.

10 Q You said that this presentation was a comprehensive
11 representation of the work in the channel model, correct?

12 A That's what he told me.

13 Q Did anyone tell you, strike that. Did you know, sir, that
14 Mr. Strickland was identified by Hallmark as a corporate
15 witness to testify on this issue?

16 A I believe I may have known that.

17 Q Do you know that Mr. Strickland at his deposition
18 testified that this came from the greetings side not the
19 channel side?

20 MR. GERMAN: I'm going to object. Improper
21 impeachment. There's no transcript. No foundation. Can't
22 impeach him by what Strickland said.

23 THE COURT: You shouldn't ask him to comment on the
24 testimony of another witness.

25 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING

1 PROCEEDINGS WERE HAD:)

2 MR. MANCHEL: He was designated as their Clipper
3 witness so I think under Rule 32 I can use the deposition for
4 any purpose.

5 THE COURT: You're asking this witness to comment on
6 the testimony of another witness and that's inappropriate.

7 MR. MANCHEL: I think for Rule 32, I'm about to use
8 it for any purpose including impeaching him. I'm going to show
9 five quotes from Wayne Strickland. He said Wayne Strickland
10 told him it was from channel. Because he's the corporate rep,
11 I think I can use it for impeachment.

12 THE COURT: I think you can use it. I don't think
13 you can use it for impeachment of this witness. If you want to
14 read it in the record, I don't think it's fair to impeach this
15 witness.

16 MR. MANCHEL: So I'm not permitted to show the jury
17 and this witness Mr. Strickland's testimony? I can't put it up
18 on the screen?

19 THE COURT: No. You can show the jury your
20 testimony. You just can't impeach this witness with it.

21 MR. MANCHEL: Can I ask him if it refreshes his
22 recollection about whether, in fact, he was told.

23 THE COURT: You can show it to him but you can't put
24 it up on the screen.

25 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

1 BY MR. MANCHEL:

2 Q Sir, would you take a look, please.

3 And, Jeff, do not put this up.

4 Take a look, please, at page, just read to yourself,
5 sir, page 281, lines 3 through 7.

6 Let me know when you've read that.

7 A Yes.

8 Q Would you take a look at page 284, beginning at line 24
9 and going on to page 25?

10 A Page 25?

11 Q I'm sorry. 284, 285, line 4. Then take a look at page
12 287, lines 15 through 17. And then page 290?

13 A I'm not done.

14 Q Sorry.

15 A I'm sorry. What was the next one you wanted?

16 Q I'm sorry?

17 A You wanted something else?

18 Q No. Did you finish 290, 2 through 16?

19 A No. I was working my way up to there. I was reading
20 through some other stuff but 290, 2 did you say?

21 Okay.

22 Q Sir, after reading those passages that I just put in front
23 of you is it still your view that Mr. Strickland told you that
24 this document came from channel?

25 A Mr. Strickland is saying a lot of things on page 289.

1 He's saying, there was a question, which one is part of the
2 channel analysis?

3 And he answered the one that said channel analysis.

4 Which one is that?

5 2.1 million.

6 There's other places he said other things. There is
7 a confusing amount here. I had discussions with Mr. Strickland
8 and I also had discussions with Mr. Maynard. And the combined
9 of that was that there was greetings and channel and my
10 discussions with Mr. Strickland focused most importantly on
11 whether or not the work on it was done by the date of this
12 presentation.

13 Q And if, in fact, sir, it's determined that this document
14 comes from greetings and not from channel, then your figures,
15 your damage figures would be reduced by \$1.2 million, correct?

16 A If that were found that way, yes.

17 MR. MANCHEL: May I approach the bench, Your Honor?

18 THE COURT: Sure.

19 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
20 PROCEEDINGS WERE HAD:)

21 MR. MANCHEL: Two things. I don't know if you want
22 to take a break, I'm going to a new section. Running a little
23 bit earlier today.

24 Secondly, this would have been the point in time
25 where I went into the fee portion of the issue which I'm not,

1 so I don't know if you want to put something on the record at
2 this point on that particular issue.

3 THE COURT: I'm not tracking with you. Start again.

4 MR. MANCHEL: So two things. One I can take a break
5 for the jury.

6 No. 2, this would have been the point in my
7 cross-examination where I addressed the management fee issue
8 which I understand is not something we're going to be working
9 through. But he may want to make a presentation, a proffer or
10 I don't know if we left it, we're leaving it at the jury
11 instruction phase, that's fine.

12 MR. GERMAN: That's our preference.

13 MR. MANCHEL: I wanted to be sure I was clear on
14 that. If Your Honor wants to take the break.

15 THE COURT: I'm going to ask the jury if they need a
16 break. If they don't, we'll let them out at 3:15 which will
17 shorten up the second half.

18 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

19 THE COURT: Let me ask you to step back up.

20 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
21 PROCEEDINGS WERE HAD:)

22 THE COURT: The instruction that I worked on over the
23 lunch hour will give the jury the option of charging, of
24 awarding damages as avoided costs or earnings that -- to the
25 Monitor Clipper, the management fees and transactions fees.

1 Now as a practical matter I assume the lower of those two
2 numbers is the management fee and transaction fee and submit.
3 But the instructions I intend at this moment to give gives the
4 jury the option of doing one or the other. So I guess --

5 MR. MANCHEL: That's why I was asking.

6 THE COURT: I wanted to make sure you guys knew what
7 I was thinking. So I award the avoided cost or the transaction
8 fees and management fees but not both.

9 MR. MANCHEL: Right. So the issue is I thought it
10 wasn't going to be pursued. If it is, I'll have to take him
11 through the management fee work as well.

12 THE COURT: The only evidence now is that the
13 avoidance, the cost avoidance numbers are larger. I don't know
14 what your guy is going to say. He may say that the management
15 fee and transaction costs are larger in that case then the jury
16 is going to have to pick.

17 MR. MANCHEL: He's going to say the management fee
18 and transaction are in the negative. As we went through one of
19 the motions in limine he can show the jury what happened with
20 the bankruptcy and the like, show that loss which is not
21 relevant on the avoided costs.

22 THE COURT: At the moment I intend to do it in the
23 disjunctive. The jury will have to pick. You guys will have
24 to decide.

25 MR. MANCHEL: If you want the jury to be offered

1 either or, I'll take him through it now. If not, I'll move on.

2 MR. GERMAN: Can we take a break on that so I can
3 confer?

4 THE COURT: Yes.

5 MR. GERMAN: Okay.

6 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

7 THE COURT: From the length of that bench conference
8 you might have concluded that it's time for a break. So we'll
9 take a break. About 15 minutes. We'll see you back in here
10 about 3:10.

11 (Witness temporarily excused.)

12 (Recess)

13 (The following proceedings were had OUT OF THE
14 PRESENCE AND HEARING OF THE JURY:)

15 MR. GERMAN: Your Honor, I'm not saying no but I just
16 can't make a call to drop a \$6 million claim voluntarily
17 without checking with the general counsel at Hallmark.

18 THE COURT: Then I think the answer is, Steve, you
19 probably need to go into the management fees.

20 MR. MANCHEL: I'll be brief.

21 THE COURT: All right. If the jury is ready.

22 MR. GERMAN: We'll get our witness back on the stand.

23 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
24 PROCEEDINGS WERE HAD:)

25 MR. MANCHEL: In this section I do plan on asking the

1 witness, I want to make sure it's okay with the Court. I have
2 to take him through because he says he doesn't know, didn't
3 matter to him where the fees went. I'm going to take him
4 through the corporate ownership structure and show he's
5 testified he knows they're legally distinct entities and he
6 also knows they were sued in this case and they are no longer
7 defendants because I want to make it clear through him that he
8 knows as the 30(b)(6) witness for Hallmark and their expert
9 witness.

10 THE COURT: I'm not sure what is added by the fact
11 they were sued and they're no longer defendants.

12 MR. MANCHEL: Because it accomplishes, I think it
13 will establish in the jury's mind that they are legally
14 separate entities for which claims could have been brought
15 against.

16 THE COURT: I don't think that's in dispute. The
17 question is -- hold it just a minute, please.

18 MR. MANCHEL: That's why I wanted to raise it.

19 THE COURT: Question is not whether they're separate
20 legal entities but whether they functioned as one organization.
21 If I was Monitor I would be very fearful who the jury will see
22 through the various shell games and recognize that we're
23 talking about one party here. I know that that's your theory
24 and I would be very concerned about that if I were Monitor.
25 But they are on paper different entities. If he says they were

1 sued and they're no longer parties, it creates the impression
2 that they were dismissed based on the merits. We all know
3 that's not the case. It was because of a lack of personal
4 jurisdiction. So I don't care if you ask him about the parties
5 but let's stay away from being parties in this lawsuit.

6 MR. MANCHEL: That's why I wanted to raise it with
7 Your Honor.

8 THE COURT: Wait. Charlie, are you done?

9 MR. GERMAN: I guess it's fair cross-examination but
10 the whole corporate structure, he didn't do any work on that,
11 it's not his area.

12 THE COURT: He can say that.

13 MR. GERMAN: That's their defense, not his but okay.

14 (The following proceedings were had IN THE PRESENCE
15 AND HEARING OF THE JURY:)

16 THE COURT: Please be seated.

17 Mr. Manchel, when you're ready.

18 MR. MANCHEL: Thank you, Your Honor.

19 KENNETH SERWIN, RESUMED

20 CONTINUED CROSS-EXAMINATION

21 BY MR. MANCHEL:

22 Q Another type of damages that Hallmark is seeking in this
23 case you talked about, you talked about with your counsel on
24 the direct was for financial gains, correct?

25 A Yes.

1 Q And those were financial gains that came supposedly from
2 the misappropriation and use of the presentations, correct?

3 A Yes.

4 Q And once again, sir, you didn't really care who got the
5 financial gain, did you?

6 A As I said at the end of the day whose pocket the funds
7 went into wasn't part of the analysis.

8 Q So you didn't care if it went to Fund II or if it went as
9 a benefit to Clipper, isn't that right?

10 A That was not part of my analysis.

11 Q It didn't make a difference to you, right?

12 A What I did identify is where these monies first flow and
13 that is where the analysis stopped.

14 Q Well, sir, you were told by Hallmark to operate under the
15 theory that it didn't matter where the money went or who
16 acquired RPG, isn't that right?

17 A I think what I said was that I didn't, my working
18 assumption was not to draw a distinction between those
19 entities.

20 Q Jeff, would you pull up, please, page 149, lines 11
21 through 16.

22 So you had the theory beforehand that it didn't
23 matter where the money went or who acquired or what the legal
24 entity was for purposes of your damages analysis?

25 As I told you I was asked at the beginning of my

1 assignment to make this summation.

2 A Yes.

3 Q Did you probably mean you made this assumption?

4 A I don't think summation is the right word. I'm sure it
5 was assumption.

6 Q But you know that Monitor and Clipper are distinct legal
7 entities, right?

8 A Yes, I do.

9 Q They're separate, right?

10 A They're separate legal entities.

11 Q All right. Now, let's go back to talking about the
12 underpinnings of this particular claim. You claim that had
13 Clipper not had access to the Hallmark information to rely on
14 RPG would not have been acquired, correct?

15 A I think I said likely.

16 Q Likely acquired?

17 A Would likely not have been acquired by Clipper.

18 Q Well, Clipper didn't buy RPG, correct, sir?

19 A Clipper effectuated the transaction by which RPG was
20 acquired.

21 Q Sir, did Clipper buy RPG?

22 A Clipper effectuated the transaction by which RPG was
23 acquired.

24 Q What does that mean?

25 A They were the ones who negotiated. They were the ones who

1 wrote the letters. They were the ones who presented themselves
2 as bidding for it.

3 Q Did they put in the final bid letter Clipper or was that
4 on behalf of Fund II, sir?

5 A I'd have to look at the letter.

6 Q Well, you just made a speech to the jury about what
7 Clipper did. Do you know whether, in fact, Clipper put in for
8 Clipper the final bid letter?

9 A I don't know if the words for Clipper. I don't think the
10 words for Fund II were in there either.

11 Q Now, before you rendered your opinion, sir, you didn't do
12 anything to determine what Clipper would have been paid if the
13 RPG deal never happened, right?

14 A I'm not sure what you mean.

15 Q Well, your argument, your theory is that Clipper's access
16 to the alleged trade secrets made it, made it likely, more
17 likely that the RPG deal could have occurred and as a result of
18 it having occurred there was a financial benefit that resulted
19 at the closing. Is that roughly right?

20 A Yes. Essentially a revenue gain for Clipper as a result
21 of that transaction going through.

22 Q So what would have happened if the RPG deal never
23 occurred?

24 A I don't know.

25 Q You don't know, do you, sir?

1 A No, I didn't do that analysis.

2 Q But, in fact, you know that there is a contract in place
3 that says exactly what happens and how Clipper gets paid if no
4 deal occurs, isn't that right?

5 A I'm not sure. I didn't review the contract to that
6 extent.

7 Q Is this some of the contracts you saw and didn't analyze
8 or is this a contract you didn't see at all?

9 A I don't know. I'd have to look at it and tell you if I
10 saw it or not.

11 Q Did you see any contractual language about the fact that
12 Clipper gets 2 percent as a fee of the amount the fund raised?

13 A I don't recall that.

14 Q So, first of all, you didn't do anything to figure out
15 what financial gain Clipper would have had if the RPG deal
16 never occurred, right?

17 A I looked at the gain that Clipper did receive as a result
18 of the transaction going forward.

19 Q Well, the issue though, sir, is did Clipper get something
20 from the RPG deal that it wouldn't otherwise get, right?
21 Because if it would have gotten it any way, that's not a gain,
22 correct?

23 A I don't know that but they did receive the money--

24 Q Well, sir, you're an economics damages expert. If Clipper
25 received \$5 when the deal closed but would have received \$10 if

1 the deal never happened, there's no financial gain from the
2 deal, right?

3 A Under your example that doesn't make any sense that anyone
4 would do that.

5 Q But that's the way it works, right? You have to show that
6 the closing actually gave Clipper a gain it otherwise wouldn't
7 have gotten, right?

8 A What I did was I identified the gains they did get.

9 Q But that wasn't my question, sir. When you do a financial
10 gains damage analysis, like you've done, the issue is what did
11 the defendant get that it otherwise wouldn't have gotten,
12 correct?

13 A I didn't do that analysis. I identified the gains they
14 did get.

15 Q Sir, I know you didn't do the analysis. My question is
16 that's suppose to be the analysis, isn't it?

17 A Not, the analysis I did is the analysis I did.

18 Q So you just said, money went to Clipper and therefore it's
19 a financial gain?

20 A It is a financial gain because it went to them.

21 Q No. 1, you don't know what money would have gone to
22 Clipper if the deal never happen, right?

23 A I think that's speculation. I'm not here to speculate.

24 Q It's not speculation. There's a contract right on point,
25 isn't there, sir?

1 A I'm not here to interpret contracts so --

2 Q No. 2, you didn't look at what happens if the money is
3 used for another deal, as opposed to RPG. If the Fund buys a
4 different company, you didn't look to see what Clipper would
5 get paid, right?

6 A I don't know if the transaction fees from a different deal
7 would be the same. I don't know what deal it would be. I
8 didn't see another deal on the table. Like I said, that would
9 be speculating.

10 Q Next, you didn't look to see whether as of the moment of
11 the RPG deal Clipper was already owed money that those fees
12 from the deal were used as an offset, did you?

13 A No, I did not.

14 Q You didn't look to see that, in fact, did anybody tell
15 you, sir, that of the money that was wired out at least
16 80 percent of that was already due Clipper. Had nothing to do
17 with RPG?

18 A I didn't do that analysis.

19 Q You didn't do it?

20 A No.

21 Q Now, the other thing, did anybody tell you about, by the
22 way, that RPG went into bankruptcy?

23 A I do know that RPG went into a bankruptcy.

24 Q And when RPG went to bankruptcy did anybody tell you that
25 Clipper lost money?

1 A I know they went into bankruptcy. I didn't see enough
2 financials to know one way or another what the end of the day
3 net was to Clipper.

4 Q Sir, all the bankruptcy documents were produced, weren't
5 they?

6 A I received a lot of bankruptcy documents. That wasn't
7 part of my analysis.

8 Q I understand that wasn't part of your analysis but if you
9 looked at the bankruptcy documents you would have seen that at
10 the end of the day with RPG, Clipper lost money, isn't that
11 right?

12 A I don't know. I didn't do that analysis.

13 Q I know you didn't do it, sir. The question is do you
14 know, sir, that is, in fact, true that Clipper is being sued
15 here for damages in a deal that it actually lost money on? Do
16 you know that?

17 A I didn't do the analysis so I don't know that.

18 Q And you said to the jury that part of your management fee,
19 part of this financial gain were the so-called management fees,
20 right?

21 A Yes.

22 Q And the management fees, I wrote this down. You said you
23 looked at the invoices for the management fees, right?

24 A That's correct.

25 Q You said the invoices totaled up to \$1.5 million, correct?

1 A That's correct.

2 Q You didn't look to see whether they were actually paid,
3 did you?

4 A I don't have the check stubs, no.

5 Q In fact, if you had reviewed the bankruptcy materials you
6 would have seen materials in there saying they weren't paid,
7 isn't that right?

8 A I believe a portion of them were part of the bankruptcy
9 proceeding.

10 Q A portion?

11 A Yes.

12 Q Do you know how big the portion was?

13 A I don't have that off the top of my head.

14 Q If I suggested to you it was almost \$700,000, would that
15 sound right?

16 A That rings a bell.

17 Q Why didn't you tell the jury when you were discussing this
18 with your counsel, why didn't you tell the jury it's not really
19 a million 5 number. It's \$700,000 less because you knew those
20 invoices hadn't been paid?

21 A Because I don't know that they didn't receive that out of
22 the bankruptcy.

23 Q You think they received it out of the bankruptcy, sir?

24 A I don't know if they did or didn't.

25 Q And you never figured out that not only did they not get

1 the invoices that you looked at, payment on those invoices, but
2 when the RPG bankruptcy was done, who ended up with RPG?

3 A I believe American Greetings.

4 Q Did you see any money flow from the bankruptcy --

5 A I'm sorry?

6 Q Did you see any money come out of the bankruptcy for any
7 of the entities that owned RPG?

8 A No. I didn't do an analysis of the final outcome.

9 Q Now, you also testified, sir, about a reasonable royalty,
10 correct?

11 A Yes.

12 Q Now, reasonable royalty for our purposes here is, in
13 essence, a license, right?

14 A Well, the reasonable royalty is a price for the license.

15 Q And it's a license where one side in this case, it's a
16 license where one side contributes information and the other
17 pays for the right to use that information, correct?

18 A That the reasonable royalty is the price for that license,
19 yes.

20 Q I understand. So the reasonable royalty is the price,
21 that \$29.2 figure you used?

22 A That's correct.

23 Q But what is happening is one person to the negotiation
24 contributes information and the other person pays that price to
25 use it, right?

1 A The other person agrees and if there is going to be a
2 price, that's what has to be paid.

3 Q That's my next question. There has to be an agreement,
4 right?

5 A Well, but hypothetical is something that doesn't happen.
6 I mean the reality is when you do a hypothetical negotiation
7 you're doing it in litigation where the two parties are like
8 that because one did something wrong with somebody else's
9 information. This isn't a case where, well, in the real world
10 they were going to get in there and this would have been an
11 agreement. This is a hypothetical construct. It's used as a
12 way to determine what the value of what was misappropriated or
13 in a patent case was infringed was worth.

14 Q Well, again, sir, I'll get there. My first question is
15 that there has to be a deal, right? A deal has to be reached
16 for an agreed upon price, right?

17 A Well, the hypothetical is the hypothetical negotiation and
18 the reasonable royalty construct is an assumption that there
19 has to be. That's the result. That's what we're doing here.
20 In the real world would there be a deal? No. That's not
21 required.

22 Q I didn't say anything about real world or otherwise.

23 A I'm just clarifying.

24 Q I don't think I was unclear. I'm just asking you, sir,
25 there has to be a deal, right? We agree, there has to be a

1 deal?

2 A The results of a hypothetical negotiation is license.

3 Q Okay. And as you keep saying, it's hypothetical, right?

4 A Yes.

5 Q So in this hypothetical license negotiation, the party
6 that is contributing the information is Hallmark, correct?

7 A Yes.

8 Q And the party that supposedly needs to agree to pay for
9 that license, pay the reasonable royalty, is Clipper and Adam
10 Doctoroff, right?

11 A That isn't -- What I did is I calculated what the
12 reasonable royalty that Clipper and Doctoroff would have agreed
13 would be paid.

14 Q But they wouldn't be the ones paying?

15 A Well, at the time they probably would have had to pay it
16 in the same way that the costs for the research or the cost of
17 consulting would have had to have been paid because it had to
18 be paid at that time.

19 Q So in order for there to be a deal and a price, a couple
20 of things have to happen. First, they have to be able to
21 afford it, right?

22 A As I said, they would have to be able to come up with the
23 money to pay it.

24 Q I didn't ask you that, sir. My question was they had to
25 be able to afford it, correct?

1 A They would have to be able to pay it. It would have to
2 make economic sense and they would have to be able to pay it.

3 Q Have to make economic sense and have to be able to pay it.
4 In fact, at your deposition, sir, which we talked about this
5 morning, you gave us a really good example where you said if
6 one side wants a price of \$10,000 but the other wants a price
7 of a thousand, that deal is never going to happen, correct?

8 A No. That's not what I said.

9 Q Jeff, would you pull up page 247, line 18 through page
10 248, line 2.

11 Now here talking about the lump sum. Do you see that
12 word, the second one, the lump sum?

13 A Yes.

14 Q Lump sum means one time payment once, right?

15 A Yes.

16 Q Big number. 29.2 million, right?

17 A Yes.

18 Q And your argument is that the \$29.2 million lump sum
19 figure is the way to go in this case, right?

20 A Yes.

21 Q Now, what you said was, no, it's with, no, it's with
22 respect to if the -- so a lump sum is a large up front payment.
23 So it was a question of would a licensee have the wherewithal
24 to pay a large amount upfront. If they don't have the
25 wherewithal then in negotiation it's hard to imagine that it

1 would result with, you know, if I, you tell me that, you know,
2 I've got a thousand dollars in the bank. I need to pay 10,000
3 for something and the bank won't loan me 9,000, it's just not
4 going to happen, right?

5 A Yes, I said that.

6 Q Now, in this case you did absolutely nothing to determine
7 when you came up with that \$29 million figure whether these
8 clients could afford that, isn't that right?

9 A No. I referenced this morning that these clients
10 represented to RPG that they could get financing necessary to
11 effectuate a \$305 million purchase. So if they could get
12 financing to do 305 million, I believe they could get financing
13 to do 29.2, if they didn't have that already in hand.

14 Q Jeff, would you pull up page 197, lines 18 and 19. Could
15 you go back to, lines 16 to 19.

16 Here we're talking about a \$12 million fee connected
17 to the BMR project, correct?

18 A This is talking about the value of the Monitor IP.

19 Q And talking about RPG, right?

20 MR. GERMAN: Your Honor, I'm going to object. This
21 is not impeaching. It is two completely different subjects.
22 This is not impeachment.

23 MR. MANCHEL: I'll rephrase, Your Honor.

24 BY MR. MANCHEL:

25 Q Now, you said, now, again, that Clipper was making the

1 representation that it would be able to get the money for the
2 deal, correct?

3 A Yes.

4 Q Did you do anything to see what assets Clipper had at the
5 time?

6 A No.

7 Q Did you see what money Clipper had in the bank at the
8 time?

9 A No.

10 Q Did you see if there was any bank that would loan any
11 money to Clipper in 2005, let alone these types of loans?

12 A I relied on their representations that they made.

13 Q Well, the representations you claim they made are that
14 they could go out and find money for the deal, correct?

15 A We could pull up the letter, again, and see exactly what I
16 relied on.

17 Q My memory is it would be no trouble getting financing for
18 the deal, correct?

19 A If you could pull up or if I could have the letter in
20 front of me.

21 Q I'm not sure which letter you refer to, sir.

22 A The July 25 letter.

23 Q You should have that in front of you.

24 A I don't think I was handed the letter. I think it was
25 just up on the screen.

1 Q I don't have it with me, sir.

2 A I can't speak to exactly what is in there without having
3 it.

4 Q Well, you know, sir, that Clipper didn't get any loan in
5 connection with this case, right? You know they weren't the
6 borrower, right?

7 A In the actual transaction I know they weren't the
8 borrower.

9 Q So who was the borrower?

10 A I believe RPG in the end was the borrower.

11 Q When you go out and get a house and you get a mortgage for
12 your house and a loan, the house is the collateral for the
13 mortgage, right? Do you have a mortgage on your house?

14 A I do have a mortgage on my house.

15 Q The collateral for your mortgage is your house?

16 A I believe it is, yes.

17 Q What was the collateral for this loan?

18 A I don't know. I didn't analyze it that way. What I
19 referred to was a representation by Clipper to William Blair
20 associated with the round one bid that they had no financial
21 constraints. They could borrow money and they could borrow up
22 to \$305 million.

23 Q Who borrowed it, sir?

24 A Who borrowed later on when the transaction occurred is a
25 different issue. This is a question of Clipper representing

1 that they don't have the capital constraint.

2 Q To put the deal together, right?

3 A That's not what it said.

4 Q You don't have any experience in the private equity world,
5 do you, sir?

6 A I don't, no.

7 Q Do you have any idea what would happen if every private
8 equity company was viewed as being the actual owner of these
9 companies?

10 A You know, I think you asked me a similar question, I
11 don't.

12 Q Yeah, you don't. So the price that you claim should be
13 paid, if I'm getting this right, is \$29.2 million lump sum,
14 correct?

15 A Yes.

16 Q And your argument is that now that Clipper is sitting at
17 the table, if I'm getting this right, negotiating for others?

18 A Well, they're negotiating at the time. They're the only
19 ones there. There are no others at that time.

20 Q But the others are the ones who are going to be paying,
21 right? They're going to be beneficial owners as you said in
22 your deposition?

23 A They may eventually pay, yes.

24 Q Well, you didn't say in the deposition eventually, sir.
25 You said they would be the ones paying, isn't that right?

1 A I believe what ever I said is what I said.

2 Q Well, we looked at it this morning, didn't we?

3 A Yes.

4 Q So there was no eventually tucked in there?

5 A There wasn't an eventual tucked in what I said, but as I
6 explained this was a timing issue. That at that point in time
7 there was nobody else. There was Clipper. And similar to the
8 avoided costs we discussed it would have come out of their
9 pocket. I didn't do any further analysis of what further
10 pocket it would have ended up.

11 Q And in terms of ownership as we saw this morning of the
12 \$29.2 million figure, if the jury decides that that's the right
13 price, Clipper's piece of that, actual piece is 1.4 percent,
14 isn't that right?

15 A I don't know that.

16 Q Well, the way the Fund works, do you know how many limited
17 partners there are in the Fund, sir?

18 A I don't.

19 Q How many?

20 A I don't.

21 Q Oh. If I suggested to you that there were over 90 limited
22 partners in the Fund, would that sound about right to you?

23 A I don't know if that sounds right or not. I don't know.

24 Q Do you know how many of them are large companies?

25 A No, I don't.

1 Q So but you do know that Clipper, from that whole big fund
2 what Clipper has is a 1.4 percent interest, right? We talked
3 about that this morning?

4 A You shared that with me, yes.

5 Q And 1.4 percent of the 29.2, we agreed is \$406,000,
6 correct?

7 A That mathematical calculation is correct, yes.

8 MR. MANCHEL: Your Honor, one second, please.

9 I'm sorry, Your Honor.

10 BY MR. MANCHEL:

11 Q The next item or another item that has to be addressed in
12 this hypothetical negotiation, we touched on again this
13 morning, is there has to be an expectation of profit, right?

14 A There has to be an expectation of benefit, yes.

15 Q Not benefit, sir, profit, correct?

16 A Well, the benefit in this case is profitability.

17 Q So there has to be an expectation of profit, correct?

18 A There has to be an expectation of profit, yes.

19 Q And, again, these are the licensees, right? These are the
20 people sitting at the table?

21 A Yes.

22 Q And you didn't determine in your analysis what profit
23 Clipper expected for itself, isn't that right?

24 A That's correct.

25 Q What you did was you determined in your analysis what

1 profit the non-party companies would have expected, correct?

2 A No, I wouldn't put it that way. What I did was I
3 evaluated the totality of the profit that would be generated by
4 the presentation trade secrets that was being negotiated for
5 between Hallmark and Clipper.

6 Q No, you didn't figure out the totality of the profit.
7 Your job was, as part of the analysis was to figure out an
8 expectation of profit. Because the rule is in our hypothetical
9 negotiation, the rule is that the person paying the money at
10 that moment, to use your phrase, at that moment has to have an
11 expectation that when all is said and done they will make a
12 profit. They don't have to get one. But sitting there at that
13 moment they have to have an expectation that they would get a
14 profit after payment, right?

15 A I think that in this case Clipper is negotiating over the
16 entire benefit stream, the entire profit stream in the same way
17 that they were negotiating through William Blair for the
18 purchase of RPG, they were negotiating on behalf of others.

19 Q Sir, I'll ask you, again, it is a rule in this
20 hypothetical world we're talking about where the party to the
21 license has to expect a profit upon the payment at the moment
22 the reasonable royalty is paid, right?

23 A No.

24 Q So let me get this straight --

25 A You've set up, that's your rule. The parties that are

1 negotiating this, both sides must expect that the position that
2 they're negotiating on is an economically reasonable position.
3 And the position that Clipper would be negotiating on at that
4 point is it's economically reasonable to pay \$29.2 million for
5 a license given that having a license to this will enable this
6 IP to be used by RPG and will achieve benefits that we talked
7 about.

8 Q So in your logic it would be, Clipper would say it's
9 reasonable for me to pay \$29.2 million, using the words you
10 just used, because I'll get these trade secrets and they'll be
11 really beneficial for RPG, right?

12 A Yes.

13 Q So RPG will use the trade secrets that Clipper paid for
14 and only RPG will get the money, right?

15 A Wrong. As I understand it Clipper was managing RPG once
16 this transaction occurred. Clipper is sitting there saying
17 we're going to use these things when we're managing RPG. Now
18 while we're using these things, while we're managing RPG, RPG
19 is going to achieve these higher growth and higher cash flows
20 so this is what this is worth and that's the \$29.2 million.

21 Q Why are you assuming that Clipper is managing RPG? What
22 are you basing that assumption on?

23 A I believe after the transaction members of Clipper were in
24 charge of RPG.

25 Q You do?

1 A Yes.

2 Q So do you know if any member of Clipper was the president,
3 vice president, or secretary of, corporate officer of RPG?

4 A I believe they were on the board.

5 Q They were on the board. Do you know how many non-Clipper
6 members were on the board?

7 A I don't.

8 Q You know, so you don't know who was in control of RPG
9 correct?

10 A Well, I don't know. I don't have the ownership structure.

11 Q You don't know who's on the board. You don't know who is
12 the corporate officer. You don't know the corporate structure.
13 But you just assumed that Clipper would pay \$29.2 million
14 because it would help Clipper manage RPG, right?

15 A Well, I looked at the, there one of my demonstratives that
16 had discussion points. And Clipper was saying what Clipper was
17 going to do and there were we's. Clipper was going to use this
18 information. We are going to be able to do this. That was
19 Clipper, what Clipper was going to be able to do.

20 Q Okay. So after Clipper was supposedly the manager but my
21 original question to you was after paying this money you agree
22 with me that all of the revenue from card sales and the like
23 goes to RPG, not Clipper, correct?

24 A It goes to RPG.

25 Q Then if things work really, really well and RPG is sold

1 and there is a profit, the money would go to the two former
2 owners, correct? You know that, right?

3 A It would, as I think I discussed, it would go to the
4 owners of the profit stream.

5 Q Okay. The owners of the profit stream are the two former
6 owners of RPG, correct?

7 A I believe they had some shares, yes.

8 Q Then it would go to Fund II, correct?

9 A I believe Fund II owned --

10 Q Clipper's piece of Fund II was 1.7 percent, correct?

11 A I believe that's correct.

12 Q And your argument is it would be economically reasonable
13 for a company to pay \$29.2 million so at the end of the day to
14 get 1.7 percent of something?

15 A I don't believe that is what I'm saying. I'm saying
16 Clipper is negotiating and will come up with this royalty based
17 on the totality of these expected benefits. And they are the
18 negotiator of this. And that they could not put a deal
19 together that would work the way the deal they were trying to
20 do without this license.

21 Q Now, in order for there to be any profit, we all need to
22 assume that it was expected that RPG's revenues would grow,
23 right?

24 A Over time, yes.

25 Q Sitting there in September, has to be an expectation that

1 RPG would make enough money that somewhere down the line it
2 would be sold for a high enough price so that the money would
3 go to, as you keep calling them, the beneficial owners, right?

4 A Well, there is an expectation, both Kelso and Clipper had
5 an expectation, RPG had an expectation of a certain amount of
6 so-called organic growth. They had been growing. They were
7 going to continue growing along a certain path. This is the
8 amount of growth over and above that growth and that's the
9 expectation.

10 Q Well, you said, sir, that Clipper would have expected in
11 September 2005 that five years later the gross revenues of RPG,
12 the total revenues, would reach approximately \$205 million,
13 isn't that right?

14 A That's one of the two approaches that I used.

15 Q I'm asking you about, let's look at the approach that you
16 used. We talked about the bid differential approach. The
17 other approach you used, one of the components of it was that
18 the total revenues of RPG, the assumption was to grow to
19 \$205 million in five years, right?

20 A That was the calculation, yes.

21 Q Okay. And you're telling the jury that that's what
22 Clipper expected in September of 2005, that's what you believe
23 it would have expected, right?

24 A That is a calculation that is based on the expectation of
25 doubling the revenues from the Monitor IP, or not, excuse me,

1 all of the unique IP that was brought to bear by Clipper would
2 add \$91 million and I added that to the Kelso base case which
3 is assuming the market expectation of how it would grow and the
4 result is 205 million.

5 Q So is that a yes, sir.

6 A That's the calculation.

7 Q But my question was, I didn't ask for your calculation.
8 The question was, did you as part of your calculation or as the
9 conclusion of your calculation, did your analysis rest on the
10 notion that in five years when Clipper was sitting there in
11 September at this negotiation table, you're representing to the
12 jury that Clipper in September of 2005 would have expected the
13 revenues to grow to \$205 million?

14 A Not necessarily. That is a calculation that was used to
15 come up with a running royalty rate which, as I discussed
16 earlier, there was a lump sum royalty and there was a running
17 royalty calculation. And I made a series of assumptions in
18 order to calculate the running royalty. And that calculation
19 you're referring to was in that.

20 Q But you based that assumption on what you believe Clipper
21 would have expected, right? Based on your view of the
22 materials?

23 A That is what I believe was an appropriate way to calculate
24 a reasonable royalty rate.

25 Q Now, in fact, sir, Clipper did all sorts of analyses,

1 financial analyses in the September 2005 time period, isn't
2 that right?

3 A There were many, many, many financial analyses.

4 Q Called LBO models?

5 A I saw a lot of them.

6 Q Saw a lot of LBO models, right?

7 A Yes.

8 Q See a single LBO model that had in it gross revenues of
9 RPG in five years of \$205 million?

10 A I don't believe so.

11 Q You didn't, did you, sir?

12 A No.

13 Q Did you look at the LBO model, the financial model that
14 was done on September 16 of 2005, almost within moments of this
15 hypothetical negotiation?

16 A As I said, there were so many I don't know which one
17 you're talking about without seeing it.

18 Q Jeff, put up, please, Defendant's 73.

19 Did you look at this, sir?

20 A I'm seeing, what I'm seeing I can't tell you. I'd have to
21 look.

22 Q Jeff, can you pull back?

23 Take a look at this model?

24 A As I said, I looked at a lot of LBO models. This,
25 given -- I looked at a lot of them, I probably looked at this

1 one. I can't tell you. I can't read it.

2 Q Well, this is the model from two weeks, within two weeks
3 of your hypothetical negotiation, isn't it?

4 A This is a model from within two weeks. I believe there
5 were lots of models continually being performed. And I believe
6 I looked at these and took information from the deposition of
7 Peter Kim of Clipper about these models. And I don't know if
8 this is the model that was the one that was taken to the
9 investment committee of Clipper but he discussed that a model
10 was taken to the investment committee of Clipper which had
11 numbers which were lower than the numbers of 205 million in
12 year five. And he said, yeah, we took that to it but everybody
13 who was there knew that this was conservative and we expected
14 much more.

15 Q My first question which you answered was, you based the
16 theory on a sales revenue figure of \$205 million which you
17 never saw in a single financial model that was run by Clipper,
18 right?

19 A And I said that I didn't. There was a separate
20 calculation in my analysis which was to arrive at a reasonable
21 royalty rate. And in that analysis I performed a certain
22 calculation where I took the expected doubling of revenues and
23 I added that to the Kelso base case which was a conservative
24 way of coming up with the royalty rate.

25 Q In fact, in this model which is two weeks away from your

1 hypothetical negotiation, not 205 million, there is 115 million
2 projected in sales, isn't that right?

3 A I can't see it.

4 Q If you look toward the right?

5 A What I'm looking at is very, very small.

6 Q I'll give you a copy, it's easier to read.

7 See the figure there?

8 A In this model, I see that, yeah.

9 Q So you have an analysis that says Clipper expected on
10 September 1 revenues of 205 million, but you didn't look at the
11 analysis that Clipper actually did on September 16 that said it
12 expected revenues of 115 million, right?

13 A As I said, there were hundreds of these LBO models done.
14 I don't know which one this is. You're putting one in front of
15 me. This one does have those low numbers. I don't know what
16 the result of this one is. And as I said, I reviewed the
17 deposition of Peter Kim who said, yeah, we did one model which
18 we took to the investment committee to get okayed for the deal
19 and it was a conservative one and everybody knew that we were
20 low balling the numbers because it was going to be bigger and I
21 took that into account.

22 Q Sir, but the jury just saw Peter Kim's deposition. You
23 sure that comes from Peter Kim's deposition?

24 A I'd have to look but I know he discussed going to the
25 investment committee and discussed what the view point was of

1 the model he took there.

2 Q Do you know who Peter Kim was on the deal team, sir?

3 A I believe he was an analyst.

4 Q Do you know what position he held on the deal team?

5 A No, I don't.

6 Q Do you know he was either the most junior or second most
7 junior on the entire project person?

8 A I don't know one way or the other.

9 Q Do you know he had only been in the private equity world
10 for one year?

11 A I don't know.

12 MR. GERMAN: Objection to that. I don't think
13 there's any evidence of that. Counsel is talking about
14 things --

15 THE COURT: The jury will recall the evidence.
16 Overruled.

17 BY MR. MANCHEL:

18 Q Do you know, sir, I think, I could be wrong about this but
19 I think he joined Clipper in August of 2005. Do you know that?

20 A I don't know one way or the other.

21 Q So is it your testimony that the most junior person on the
22 RPG team, who had been there a month, walked into the
23 investment committee presentation and announced that the
24 leveraged buy out models they're using were way conservative
25 and would be juiced up?

1 A I didn't say he walked in the investment committee and
2 announced anything. I said that in his deposition, as I recall
3 it, he reflected that models were taken to the investment
4 committee and that the people at the investment committee
5 believed that they were understated.

6 Q Okay. Jeff, would you pull up Defense Exhibit 487,
7 please?

8 This is a memo, sir. Ever seen this? This is Bill
9 Young who is running the RPG deal, Charlie Yoon, Paul Maxwell
10 and there is Peter Kim. Do you see that?

11 A I do.

12 Q Did you look at this memo when you formed your opinion
13 about the \$205 million?

14 A You know I might have seen it. As I sit here, I don't
15 recall.

16 Q Jeff, pull it back.

17 Take a look at it, sir. Do you see anywhere in the
18 memo \$205 million?

19 A No.

20 Q Do you see what number they're using?

21 A Well, \$205 million is a one-year revenue for 2010 that's
22 in a schedule that I have in my analysis that calculates
23 reasonable royalty rate.

24 Q I know you put a schedule together with that figure in
25 there. I'm asking you as of this time period --

1 A I'm scrolling through something. Do you have a hard copy
2 I can look at and review the whole document?

3 Q It's Defendant's Exhibit 487, please. I think you'll find
4 the number on the second page, sir. You'll find another one on
5 the third page.

6 A Yes.

7 Q What are those numbers 117, 117 million, right?

8 A These are the low growth cases. They did a number of
9 scenarios, they did lots of scenarios. As I said, my
10 recollection of the Kim testimony is he discussed this low
11 growth case was taken to the investment committee and he said
12 that everybody understood that it would be bigger than this.

13 Q So your analysis is based on what you think the most
14 junior person on the team said about what happened at the
15 investment committee but it is not based on an actual financial
16 model, one within two weeks of your hypothetical meeting or a
17 memorandum written by the people running the deal for Clipper
18 at the moment, is that right?

19 A This memorandum simply has two low growth cases and it
20 doesn't have anything more than that. It doesn't have the
21 other cases. I said there were lots of models that were run.
22 And I did rely on the discussion of a party who was there doing
23 this, Peter Kim. And I don't have the specific cite in front
24 of me. I'm looking whether it's in my report. But if you
25 would like me to sit and review the deposition of Peter Kim to

1 find the exact, I would be happy to.

2 Q Did you ever find a model that Peter Kim did that had the
3 \$205 million revenue figure in it?

4 A No.

5 Q Now, you also opined about a running royalty. And the way
6 a running royalty works if I follow it is, we're still at the
7 hypothetical negotiation. The way the running royalty works is
8 the agreement this time is each year Clipper will pay X amount
9 of dollars, millions of dollars as opposed to paying a really
10 big number once, right?

11 A Yes.

12 Q And your theory is that, okay, so Clipper pays the running
13 royalty on day 1 for a year, right?

14 A Well, they don't pay that day 1. They pay it whatever the
15 terms of the license would say whatever the measurement point
16 is.

17 Q So this is a negotiation as well, right?

18 A Well, the license comes out, usually there is something
19 that says we will have an audit at the end of the year and we
20 will be provided your audited financials and the royalty will
21 be based on that. And real licenses have clauses within them
22 that say we have the right to go back and make sure it's right,
23 so on and so forth. But it's a running so it's not up front.
24 It's something that would occur over time.

25 Q So the way this works for you is Clipper would pay the

1 money and then the revenue that the money is based on would all
2 go to RPG, not Clipper, right?

3 A Well, the royalty is based on a certain amount of revenue
4 and the base of that is the revenue of RPG.

5 Q I think that's what I just said. Every year you would
6 have Clipper pay a royalty fee, a running royalty fee but the
7 money would go to RPG, right?

8 A As I said I didn't do the specifics of who would pay the
9 running royalty. I didn't make an opinion one way or the other
10 on that.

11 Q In fact, you assumed the running royalty would be paid by
12 parties other than Clipper, didn't you?

13 A No, I don't think I assumed that either.

14 Q Jeff, would you go to Serwin, page 258, line 10 through
15 259, line 5. Would you highlight it, please? 258, line 10.

16 In your hypothetical license negotiations, why would
17 Clipper pay fees each year on a running royalty license when
18 the revenue is being captured by RPG?

19 ANSWER: Because as I've told you, I was asked to
20 assume for purposes of my calculation that there is no
21 distinction between Monitor Clipper Partners L.L.C. and Fund II
22 which owned RPG.

23 Do you see that?

24 A I do.

25 Q So you know Fund II owned RPG, correct?

1 A I think we talked about that earlier in this deposition
2 and yes, I do.

3 Q Well, you're being asked to say there's no distinction
4 between Monitor Clipper Partners L.L.C., between the
5 partnerships that constitute Fund II, between RPG Holdings,
6 Inc. and between RPG Corporation, correct?

7 ANSWER: So to be clear, regardless of the entity
8 that generates the revenue the owners of the profit stream that
9 would be derived from that revenue are the parties that would
10 be paying the royalty.

11 Do you see that?

12 A I do.

13 Q You don't say Clipper would pay it then someone else would
14 pay it afterward, do you, sir?

15 A I said I didn't draw a distinction between any of them.

16 Q No. You said the parties who would be paying the royalty
17 are the parties who would be getting the revenue. Isn't that
18 right?

19 A No. I said the owners of the profit stream that would be
20 derived from that revenue are the parties that would be paying
21 the royalty.

22 Q Right. And Clipper is not one of the owners of the profit
23 stream, is it, sir?

24 A I believe they're certainly a part of it. They have an
25 ownership in Fund II.

1 Q Of 1.4 percent?

2 A You said they don't have any. That's, they are one of the
3 owners and they were the ones negotiating on behalf of
4 everybody.

5 Q You don't say here and you didn't say in connection with
6 the lump sum that the way it would work is Clipper would pay
7 for a moment then someone would reimburse it. Your theory is
8 that the owners of the profit stream would be the parties
9 paying the license, correct?

10 A I think we're talking about the running royalty there.

11 Q You said exactly the same thing with respect to the lump
12 sum, didn't you, sir?

13 A I don't know if it was exactly but I didn't draw a
14 distinction.

15 Q Sir, I'm not asking if you drew a distinction. I'm asking
16 you did you say in regard to the lump sum that the beneficial
17 owners would pay the royalty?

18 A I don't know if I said those exact words or not.

19 Q Let's take a look. Jeff, would you pull up page 258, line
20 10 through 259 line 5.

21 MR. GERMAN: May we approach the bench, Your Honor?

22 THE COURT: Yes.

23 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
24 PROCEEDINGS WERE HAD:)

25 MR. GERMAN: I didn't want to interrupt the

1 questioning a moment ago but this is at least the third time
2 we've been back to pages 258 and 259. This cross-examination
3 started at 11:00 o'clock this morning. It's their case but it
4 is repetitive at this point. This is the third impeachment
5 with this exact same testimony.

6 MR. MANCHEL: It's my understanding it's the second
7 time. I brought him in the beginning --

8 THE COURT: It doesn't matter. You guys both have
9 time allocated to you. I have declined to intervene and direct
10 you on how you should use that time but you should both be
11 aware that we're running the clock. How you choose to use your
12 time, I'm going to let you do it but you may regret it.

13 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

14 BY MR. MANCHEL:

15 Q Would you highlight line 23.

16 On what I'm, so to be clear regardless of the entity
17 that generates the revenue, the owners of the profit stream
18 that would be derived from that revenue are the parties that
19 would be paying the royalty.

20 Do you see that?

21 A Yeah, I think we just looked at this.

22 Q Well, this is different. This is the lump sum piece.

23 A No, it's not. This is the exact same thing we just looked
24 at. And it's right above it on page 258, line 10 says in your
25 hypothetical license negotiation why would Clipper pay fees

1 each year on a running royalty.

2 Q I apologize, sir.

3 A When the revenue is captured by RPG. We just looked at
4 this.

5 Q I meant to take you to a different page, sir. I
6 apologize. Everybody has a moment. Apparently this one is
7 mine.

8 Sir, let me ask you a different question. At the end
9 of the day do you know how much money Clipper would receive if
10 RPG hadn't gone to bankruptcy? Do you have any idea how much
11 money Clipper would have received from your hypothetical sales
12 price?

13 A How much Clipper, itself, the legal entity, Clipper? No,
14 I don't.

15 Q You keep saying the legal entity Clipper. It's just
16 Clipper, right?

17 A Well, you've drawn numerous distinctions today about the
18 different legal entities. As I said and as we did just see in
19 258 and 259, I did not draw any distinction between them for
20 purposes of the damages calculation. I made that clear. You
21 made that clear. So I did not do a specific calculation about
22 Clipper legal entity.

23 Q And the reason you never figured out what Clipper would
24 actually make in your hypothetical license negotiations is
25 because the Hallmark lawyers told you not to do that, right?

1 A Well, there was no, that analysis was not done by me. It
2 was under the assumptions that I was asked to make.

3 Q My question is --

4 A -- not an analysis to perform.

5 Q I understand you never figured out how much Clipper would
6 make. My question to you is you never figured out how much
7 Clipper would make because the Hallmark lawyers told you not
8 to, right, from the beginning?

9 A No. You're saying they told me not to. I was working
10 under an assumption about don't draw a distinction. So if I'm
11 not drawing a distinction there was no need for me to do that
12 analysis.

13 Q Well, who told you not to draw a distinction?

14 A That was an assumption I was asked to make.

15 Q Who told you to make it?

16 A That was an assumption I was asked to make by counsel for
17 purposes of doing my analysis.

18 Q The lawyers from Hallmark, right?

19 A Yes.

20 Q And if they told you, please figure out what Clipper would
21 have made on the profits in your hypothetical license, you
22 could have figured that out, right?

23 A Perhaps.

24 Q Any doubt in your mind, sir, that you couldn't have
25 figured that out?

1 A I don't know if I would have had all of the data to do the
2 analysis or not. I didn't do it.

3 MR. MANCHEL: No further questions, Your Honor.

4 THE COURT: Redirect?

5 MR. GERMAN: Yes. But not very much.

6 REDIRECT EXAMINATION

7 BY MR. GERMAN:

8 Q While I'm getting some papers around here, could we just
9 have Exhibit 55 pulled up, please.

10 Dr. Serwin, we looked earlier today during your
11 presentation at Exhibit 55 and you had this question and the
12 answer put into your slide show. Do you recall that line of
13 questioning?

14 A I do.

15 Q Then during the cross-examination you were asked
16 repeatedly about Clipper not being the entity running RPG or
17 deriving any benefit from the ownership. Did you consider
18 those issues when you looked at Exhibit 55?

19 A Well, when I looked at Exhibit 55 what I saw was that MCP
20 believed that they were going to be able to derive growth and
21 produce high cash flow from RPG that others can't. I don't
22 know how they are going to do that if they're not the ones
23 using this information and operationalizing this information.

24 Q Now, I'd like to pull up Exhibit 422. And just highlight
25 the top part of it. First paragraph, please. And the top, the

1 heading. Well, I need to see the top part. There you go. And
2 the date, please, December 2005. There. Perfect.

3 Weil Gotshal Manges Law Firm in New York. Are you
4 familiar with them, Dr. Serwin?

5 A I know of the firm, yes.

6 Q Have you seen this document, Exhibit 422, before?

7 A I believe that I reviewed it.

8 Q Okay.

9 MR. MANCHEL: Your Honor, may we approach?

10 THE COURT: Yes.

11 (COUNSEL APPROACHED THE BENCH AND THE FOLLOWING
12 PROCEEDINGS WERE HAD:)

13 MR. MANCHEL: Double check right now but I don't
14 think this has been admitted in evidence and I think we
15 objected to it on attorney-client privilege grounds.

16 MR. GERMAN: We checked the list.

17 MR. MANCHEL: We are pulling it right now. This was
18 not admitted so it shouldn't be on the screen.

19 MR. GERMAN: Let's take the exhibit down for a
20 moment, please.

21 MR. MANCHEL: I'm going to double check unless you
22 have the list of --

23 THE COURT: 422. Has not been admitted and it has
24 not been stipulated to.

25 MR. GERMAN: I thought it was stipulated to

1 foundation.

2 THE COURT: Stipulated as to foundation.

3 MR. GERMAN: So only relevance objection?

4 THE COURT: I don't know what the objection is beyond
5 foundation.

6 Let me have a hard copy of the exhibit.

7 Kristan Bopart at Weil.

8 MR. GERMAN: Partner at Weil.

9 MR. MANCHEL: We object to this on hearsay grounds.
10 I have no idea. He says she's a partner. I can't argue with
11 it but.

12 MR. GERMAN: Your Honor, if you look at the bottom
13 right you'll see the MCP production number on this, was
14 produced to us by Clipper, part of the closing binder on the
15 RPG just like the flow of --

16 MR. MANCHEL: I didn't say it was attorney-client
17 privilege, Your Honor.

18 THE COURT: You're saying it's a business record?

19 MR. GERMAN: It's a business record.

20 MR. MANCHEL: I don't know what the foundation is,
21 how that's demonstrated.

22 THE COURT: You stipulated to it as to foundation.
23 The objection to the 422 is overruled. You may proceed.

24 (THE PROCEEDINGS RETURNED TO OPEN COURT.)

25 MR. GERMAN: Put it back up, please.

1 BY MR. GERMAN:

2 Q Now, you understand, Dr. Serwin, that the Weil Gotshal
3 Manges firm in New York represented --

4 Next paragraph 2, Cindy. Please get rid of those
5 right here.

6 That Weil Gotshal represented buyer and Monitor
7 Clipper Partners. Do you see that?

8 A I see that, yes.

9 Q Look at the first paragraph here. No. Up. There you go.

10 So this is Clipper's counsel documenting and
11 describing the corporate transaction in which RPG was acquired.
12 Do you see that, sir?

13 A I see that.

14 Q Okay. And what you told us throughout your
15 cross-examination is that these kinds of legal structures
16 documents were not part of the analysis you did?

17 A They were not.

18 Q Now, what we see in the closing memorandum is the
19 documentation of the acquisition by Monitor Clipper Partners
20 together with its affiliates of a majority interest in Recycled
21 Paper Greetings. That occurred on Monday, December 5, that was
22 your understanding when the transaction closed?

23 A Yes.

24 Q December 5. And it was done pursuant to a stock agreement
25 dated November 2, right?

1 A That's what it says, yes.

2 Q When was the hypothetical negotiation that is actually the
3 relevant date in this case?

4 A September first of 2005.

5 Q So this entire transaction, the creation of the buyer and
6 the investment holdings, signing of the contracts and the
7 closing of the deal takes place after the relevant date for the
8 hypothetical royalty, true?

9 A That is true, yes.

10 Q Let's skip down just a little bit to paragraph No. 2. At
11 a prior time. So at or prior to signing Clipper forms the
12 buyer. Then the buyer forms acquisition for it. Then the
13 memorandum goes through and documents, the steps of the
14 acquisition. This is not relevant to your analysis?

15 A Well, this is relevant to the extent that it shows that at
16 the time of the hypothetical negotiation the party that was
17 there and the only party that was there was Monitor Clipper.

18 Q Now, Cindy, if you would, please, just skip over to the
19 second to the last page of this exhibit. The schedule 1. Post
20 closing.

21 And post closing, after the deal was done,
22 Dr. Serwin, we see that Recycled Paper Greetings, the target
23 company, the card company, has a board of directors composed of
24 William Young and Charles Yoon. Who are they?

25 A I believe they are part of Monitor Clipper.

1 Q Okay. And we see that Mr. Levine, who we heard about, and
2 two others are there. But Charles Yoon, Clipper, is an officer
3 of the operating company as well, right?

4 A That's what this indicates, yes.

5 Q Then we see a company called RPG Holdings and its
6 directors are Yoon and Young, Clipper people, right?

7 A Yes.

8 Q And then we have RPG Investment Holdings. And here we
9 have Calhoun, Young and Yoon from Clipper, right? Are you with
10 me on that?

11 A Yes.

12 Q And then Friedman and Keiser, they're the sellers, right?
13 And then Mr. Levine and Mr. Murray and they are officers of the
14 operating company. But it's these three people are Clipper,
15 right? In RPG Investment Holding, Calhoun, Young and Yoon?

16 A Yes.

17 Q Then in that RPG Investment Holdings, Inc. Bill Young is
18 the president, Clipper guy, right?

19 A Yes.

20 Q Charles Yoon, secretary treasurer, the only two officers,
21 Clipper guys, right?

22 A Yes.

23 Q There is a couple of subsidiaries, Canada and Barnyard
24 Industries and RPG Canada, here the board of directors is Young
25 and Yoon, Clipper guys?

1 A Yes.

2 Q Barnyard Industries, Young and Yoon, Clipper guys?

3 A Yes.

4 Q Officers, Young and Yoon, Young and Yoon for both
5 subsidiaries, right?

6 A Yes.

7 Q So the corporate structure that came into being in
8 December, two months after your hypothetical negotiation,
9 creates all of these entities in which Clipper and its
10 affiliates have taken control of RPG?

11 A Yes.

12 Q But that's not part of what you considered in the royalty,
13 correct?

14 A That's correct.

15 Q Now, let's, I want to ask you about the Fund II side of
16 this. And just to make things kind of simple I'm just going to
17 use a white board but you understand that Fund II is actually
18 comprised of two partnerships, right?

19 A I believe so. I've seen contracts that way but I don't
20 have a full legal understanding of that.

21 Q We're just going to write Fund II?

22 THE COURT: Just a moment.

23 MR. MANCHEL: Objection. I object to it.

24 THE COURT: And the objection is.

25 MR. MANCHEL: My objection is he's leading. The

1 witness has testified he didn't look at this. He didn't
2 analyze it. And he said it's beyond his scope.

3 THE COURT: This part is leading. You want to
4 pursue -- may ask that --

5 MR. GERMAN: For the leading question he was
6 cross-examined for an hour on Fund II.

7 THE COURT: It was a leading question.

8 MR. GERMAN: Okay.

9 THE COURT: I'd like to hear from the witness what he
10 knows compared to what you know.

11 MR. GERMAN: Fair comment, Your Honor.

12 BY MR. GERMAN:

13 Q Do you know, Dr. Serwin, what the entities are that
14 comprised Fund II?

15 A I believe there are two entities. I don't know their
16 names off the top of my head.

17 Q We'll just call them 1 and 2 then. Are they limited
18 partnerships?

19 A You know, I don't know.

20 Q Do you know whether those two limited partnerships are run
21 by a general partner that is itself a limited partnership?

22 MR. MANCHEL: Objection.

23 THE COURT: Sustained.

24 BY MR. GERMAN:

25 Q Do you know anything about the structure of Fund II?

1 A Not much.

2 Q Do you know, do you know whether individuals at Clipper
3 actually control every step of the governance process and
4 decision-making process of Fund II?

5 MR. MANCHEL: Same objection, Your Honor.

6 THE COURT: He's testified he's doesn't know. That
7 may be as far as we can go with this witness. Sustained.

8 BY MR. GERMAN:

9 Q Do you know?

10 A I'm sorry?

11 Q Do you know?

12 A I know that Monitor Clipper has a lot of control.

13 Q Fair enough.

14 Let's pull up Exhibit 423.

15 Now, Exhibit 423, Dr. Serwin, is dated November 2,
16 2005. Do you see that?

17 A I do.

18 Q And do you see the authors of the letter at the top,
19 Monitor Clipper Partners II LP and Monitor Clipper Partners
20 NQP2LP?

21 A I do.

22 Q Is that Fund II?

23 A I believe it is Fund II.

24 Q Okay. So this is a letter from Fund II to whom?

25 A To RPGI.

1 Q RPG Investment Holdings?

2 A Yes.

3 Q And it's on November 2?

4 A Yes.

5 Q Okay. May we have the first paragraph, please?

6 And so what we see is that these two entities, the
7 Fund, is pleased to offer a commitment to purchase equity
8 securities, stock of RPGI to be used to fund the acquisition of
9 Recycled Paper Greetings. Is this what you call the equity
10 commitment?

11 A I believe it's the equity commitment.

12 Q And it was when? November 2?

13 A Yes.

14 Q So on September 1, the date of the hypothetical
15 negotiation, there is no equity committee. Is that your
16 understanding?

17 A That's my understanding.

18 Q Okay. And here's the purchase price of 317 and a half
19 million dollars. Okay. Are you with me on that?

20 A Yes.

21 Q Okay. Let's go the signature page of this November 2
22 letter. Who signs on behalf of Fund II?

23 A Bill Young.

24 Q Who signs on behalf of the other Fund II?

25 A Bill Young.

1 Q And who signs on behalf of RPG Investment Holdings L.L.C.?

2 A Bill Young.

3 Q So Bill 1 and Bill 2 write a letter to Bill 3. Is that
4 what we're seeing?

5 A That is what it appears to indicate.

6 Q Okay. And is this anything that you considered for
7 purposes of the royalty analysis?

8 A No.

9 Q Why not?

10 A It occurred after the date of the hypothetical.

11 Q So if RPG, I'm sorry, if Clipper ends up with this small
12 percentage of ownership in the ultimate acquisition structure
13 of RPG, that is because of events that occurred after the
14 hypothetical negotiation?

15 A All of the events that you've described occurred after the
16 date of the hypothetical.

17 Q And they were structures that Clipper, itself, put in
18 place, true?

19 A Yes.

20 Q You were asked a question about what would happen to the
21 private equity industry if private equity firms were held
22 responsible or held to be owners of the companies they target,
23 something like that. Have you studied or considered that
24 question?

25 A No.

1 Q Is it relevant to the hypothetical analysis that you did?

2 A The question isn't relevant to the hypothetical analysis.
3 The only thing that's relevant is that private equity company,
4 I'm no expert in private equity. But we just had a gentleman
5 who was running for president who was the head of a private
6 equity company. I think we all know about that. And the whole
7 point of his claim to be able to do better for the economy is
8 he knows how to run businesses because as private equity they
9 go in and run businesses and turn businesses around. That's
10 what they do.

11 THE COURT: Just a moment.

12 MR. MANCHEL: Objection, Your Honor.

13 THE COURT: Sustained.

14 MR. GERMAN: Withdrawn.

15 BY MR. GERMAN:

16 Q I'll change subjects for a moment. Let's call up Exhibit
17 547H that we looked at earlier, please. Highlight, please.

18 Dr. Serwin, the question was asked of you on
19 cross-examination of whether all of these management fees that
20 we see totaled there at the top, that total to a million 5,
21 were, in fact, paid?

22 A Yes.

23 Q And it was suggested to you that only 700,000 or so were
24 paid. Do you know that?

25 A I don't.

1 Q Then let's call up Exhibit D10, please.

2 Exhibit D10 is a stipulated exhibit. The parties
3 have agreed that it may be admitted. And this is the, well,
4 appears to be the Recycled Paper Greetings Amended Joint Plan
5 of Reorganization under Chapter 11. Do you see that?

6 A Yes.

7 Q And you do understand, I think you testified on
8 cross-examination, that RPG went through this bankruptcy
9 proceeding, came out owned by American Greetings?

10 A Yes, I do understand that.

11 Q And that's where it is today, right?

12 A Yes.

13 Q RPG, Recycled Paper never shut their doors, did they?

14 A No.

15 Q So just went through the bankruptcy. Came into the
16 bankruptcy owned by the Clipper organization affiliated
17 companies we've looked at. Came out of the bankruptcy owned by
18 American Greetings?

19 A That's my understanding.

20 Q Do you know how long that took?

21 A I don't.

22 Q For our purposes here today though let's look, it's page 2
23 of the, I think it's actually page 9 of the exhibit.

24 And if you look, Dr. Serwin, actually 1.10 we see an
25 allowed Monitor Clipper Partners claim in the aggregate amount

1 of 750,000. Do you see that?

2 A I do.

3 Q Then, Cindy, skip it over to page 20 of the exhibit,
4 section 5.9 of the plan.

5 Where the plan provided that the allowed Clipper
6 claim shall be classified as an allowed claim and paid in cash
7 in full within ten business days after the effective date in
8 full satisfaction of any claims Clipper may have.

9 Is this a document you looked at in connection with
10 your study of the management fees?

11 A I've seen this document.

12 Q Okay. And was this part of the basis on which you relied
13 to say that the 1.5 million was the correct number?

14 A Well, the basis was the invoices. And to the extent that
15 Clipper received the totality of those invoices through direct
16 payments from RPG or through the resolution of the bankruptcy
17 doesn't change. If they received it, they received it.

18 Q Now, there was some questioning, pull up, please, Exhibit
19 487.

20 This is Exhibit 487 that we've all become familiar
21 with. It has the three Power Points attached to it?

22 A Yes.

23 Q The three presentations. And this is the third one, the
24 Gold Crown Channel analysis that we've been looking at.

25 Cindy, just skip over a couple pages into the text

1 please. Okay. Fine. Stop anywhere. Then highlight for us
2 the little footer down here at the bottom.

3 We looked at some footers the other day. Let's look
4 at this one. When you were looking at these documents,
5 Dr. Serwin, first, what is YWC?

6 A I believe it's When You Care.

7 Q When You Care. And what is CHN?

8 A I believe that reflects channel.

9 Q So this document, this presentation, this is one of five
10 presentations. Is that the only one that had the CHN
11 designation on it?

12 A I'd have to look through them again but I believe so.

13 Q And who put those designations on the document?

14 A I believe that those designations came from Monitor
15 Consulting.

16 Q And so you had 3.8 million of your 5 was over here on the
17 greetings side. Then 1.2 million was on the channel piece
18 which was this presentation, right?

19 A Yes.

20 Q Okay. Now you talked on the cross-examination when
21 Mr. Manchel asked you about an error that had been made in
22 classification which resulted in you reducing the fees part of
23 your analysis from 7.2 million down to 5 million. Do you
24 recall that?

25 A I do.

1 Q So, Cindy, put up for us, please, Exhibit 488. And go to
2 the second.

3 This is the 488, has the other two presentations on
4 it, Dr. Serwin, we've been looking at. This is the second one.
5 Do you recall the Small Competitors and the Deep Discount
6 Space?

7 A Yes.

8 Q Skip over a couple pages, that's fine. Stop. Then go,
9 well, make sure it's not covered up. Get one of those footers
10 for me. Okay.

11 Has the When You Care, right, see that?

12 A Yes.

13 Q And then it has another module code from the BMR and what
14 was that?

15 A INT.

16 Q That was a code placed on there by Monitor?

17 A That's what I understand.

18 Q Does that coding have anything to do with the confusion
19 over whether this was part of greetings or something else?

20 A Well, from my point of view in reviewing the documents
21 when asking questions about whether or not the fees for the INT
22 portion of the BMR project were reflected in the presentations,
23 this document said INT. So when I was told by Mr. Strickland
24 that, yep, they're reflected in there, I didn't have a reason
25 to think, well, it says GRT or it says CHN or it says any of

1 the other ones. So from that point of view, I had no reason to
2 dispute the representations made by Mr. Strickland to me.

3 Q But, initially, it was thought that when it said INT that
4 meant it came from the integration module and that's why those
5 fees were brought into your analysis, right? Initially?

6 A Initially, as I looked at these documents I saw they had
7 documents that were GRT, had document CHN and INT. I then
8 asked questions of Hallmark about these. And I was told the
9 three projects and the consulting was done for the three
10 projects was reflected in these presentations. I had no reason
11 to dispute that.

12 Q Then when the question was raised by the defense of
13 whether that was appropriately classified as INT, you went
14 back, examined or asked Mr. Strickland to examine again and you
15 all determined that, in fact, that small competitors was part
16 of the greetings project, right?

17 A Something like that. Specifically I believe that the
18 defendant's expert said that there were two portions of the INT
19 project, that it wasn't all one. And then said that this
20 particular presentation belonged in one portion, not in the
21 other. And so disputed a portion of the 2 point whatever for
22 the totality of the INT and said, well, it could only be this
23 portion, it can't be this portion. I went back and said, okay,
24 there's more here going on. I don't understand it all. Let's
25 get down to it. And based on that discussion that's where it

1 came back and said, no, it's not in there at all.

2 Q So when you conducted that further review then and
3 determined that the small competitors was actually part of the
4 GRT or greetings module, that was the 3.8 million?

5 A Yes.

6 Q You then, the 2.2 million, that you had originally put on
7 this document, you just took out, right?

8 A Yes. Well, I didn't determine, I was told.

9 Q Strickland determined?

10 A Strickland told me this was not part of INT. And so I
11 said then there is no INT. So I lowered the number.

12 Q You lowered it from 7.2 million down to the 5 million
13 that's in the report that we're here about today?

14 A Yes.

15 Q Do you understand why the defense is complaining the
16 2.2 million was reduced from the claim?

17 A I don't know.

18 MR. GERMAN: Your Honor, I think we'll stop there.
19 Thank you.

20 THE COURT: Recross.

21 RECROSS-EXAMINATION

22 BY MR. MANCHEL:

23 Q Dr. Serwin, your counsel took you through a whole bunch of
24 corporate entities that were created after the September 1
25 date, right?

1 A Yes.

2 Q And the question to you was but they didn't exist on
3 September 1. The only thing that existed on September 1 was
4 Clipper, right?

5 A Yes.

6 Q First of all, that's just flat out wrong because on
7 September 1 Fund II existed, didn't it?

8 A Fund II existed, yes.

9 Q Nothing was created new with respect to Fund II on
10 September 1, was it?

11 A I think what he was showing me was the equity commitment
12 from Fund II had not occurred at that point.

13 Q Sir, he took you through a bunch of companies that were
14 created post September 1 and then he said to you the only
15 entity around at the time was Clipper and you said yes? Isn't
16 that right?

17 A If that's what I said and that was the structure of the
18 question, that is incorrect. Fund II existed at the time.

19 Q So the moment Clipper is sitting at this hypothetical
20 table, Clipper knows, and by the way Fund II is the owner of
21 RPG, we established that, right? The 80 percent owner?

22 A At the end of the day they were.

23 Q At the beginning of the day they were sitting there, too.
24 They were in existence, right?

25 A But they weren't sitting there. There was no equity

1 commitment on their part to this.

2 Q Now, you said, and it's true, the corporations were formed
3 later on. That's true, isn't it?

4 A The other corporations. As I just said Fund II was, I
5 don't believe was formed later on.

6 Q But the test, and I want to make sure we make this clear
7 for the jury, the test isn't what existed or didn't exist on
8 September 1, sir. The test is what did Clipper expect would
9 come to be on September 1. Isn't that right? We don't look to
10 the future. We look at what the parties sitting there believe
11 at that moment, what they would have expected, isn't that
12 right?

13 A We are looking at expectations of the parties at the
14 table.

15 Q Are you going to tell this jury that a private equity firm
16 sitting at the negotiation table in September 1 didn't expect
17 that there would be corporations formed to own it that were not
18 that private equity fund, that's not your testimony, is it,
19 sir?

20 A No.

21 Q And, in fact, everything you've seen in this case,
22 everything, led you to conclude, you have to conclude that when
23 Clipper was sitting there on September 1 the expectation of
24 Clipper would be that Fund II would be an owner, other
25 companies would own it and Clipper would not, isn't that right?

1 A I don't know one way or another what their ultimate
2 expectations of how the legal entities would have played out at
3 that point in time.

4 Q You have to know that. You have to know the parties
5 expectations on September 1 or you can't do the analysis, isn't
6 that right?

7 A On September 1 they hadn't successfully achieved a
8 successful bid. So in order to continue and come up with a
9 number that would be successful and reflect their expectations
10 and the expectations of what would happen after, they would
11 have needed a license from Hallmark.

12 Q On September 1, they didn't know RPG would go bankrupt
13 either, did they, sir? They didn't know that, did they?

14 A No, they did not.

15 Q So the jury can't assume that Clipper knew on September 1
16 RPG would go bankrupt, right?

17 A I don't believe they can.

18 Q And the jury can't assume that on September 1 Clipper
19 didn't think there would be a deal, can it? Clipper thought
20 there would be a deal on September 1, didn't it, sir?

21 A I would think Clipper hoped there would be a deal.

22 Q Clipper thought there would be a deal on September 1,
23 didn't it, sir?

24 A Clipper thought if they received that license in the
25 hypothetical, if they were able to get that license, then there

1 would be a deal.

2 Q And Clipper's expectation when it was getting ready to pay
3 this \$29.2 million, the expectation was that there would be a
4 deal, right? Because you have no evidence whatsoever that
5 Clipper would have paid \$29.2 million without that expectation.
6 Isn't that right?

7 A I think what I just said was if they wanted to make this
8 all happen, they would expect, if we get this license then we
9 will be able to get the deal.

10 Q I asked what the expectation was, sir?

11 A That's what I --

12 Q The expectation was if I pay this, it's, the deal is going
13 to get done, right?

14 A If I pay this the deal is going to get done.

15 Q The expectation was the deal is going to get done,
16 according to you, the deal is going to get done. There will be
17 companies that own RPG and it's not going to be Clipper, isn't
18 that right?

19 A I don't know why you're saying that's according to me.

20 MR. MANCHEL: No further questions, Your Honor. We
21 do have an issue for the bench, not for the witness.

22 THE COURT: All right. Dr. Serwin, you may step
23 down.

24 (Witness excused.)

25 THE COURT: Folks, do you want to go ahead the next

1 18 minutes or would you like to go home?

2 We're going to stop for the day.

3 I'll tell you that we have a matter to take up late
4 tomorrow afternoon so my expectation is that tomorrow you will
5 work until 4:00 p.m. and be released until Tuesday. So,
6 please, don't discuss the case. Keep an open mind until you've
7 heard all the evidence.

8 (The following proceedings were had OUT OF THE
9 PRESENCE AND HEARING OF THE JURY:)

10 THE COURT: Okay.

11 MR. MANCHEL: I'm not quite sure but I want to be
12 careful. And I'm going to ask you for one exception to your
13 two lawyers jumping up rule because this is an area that I
14 don't purport to know much about. But I want to raise with the
15 Court the notion that to the extent that Dr. Serwin's testimony
16 came in about expectations and the like, we don't have an
17 objection to it. To the extent there's going to be the
18 suggestion, the argument or the evidence purportedly,
19 supposedly go to some type of collapsing of the entities or
20 piercing of the veil, my understanding, number 1, we object.
21 But my understanding is under Missouri law that has to be pled
22 and it was not in this case. Again, if I could indulge the
23 Court's permission and ask Stacey to address this because it is
24 not a subject on which I'm conversant. Thank you.

25 MS. GILMAN: Your Honor, our concern is they've never

1 pled piercing of the corporate veil and obviously in the midst
2 of trial is not an appropriate time to do it. There were a
3 series of questions that were asked about Bill Young and other
4 people who have an interest in Monitor Clipper and also have an
5 interest in other entities. There were some allusions to it in
6 the opening if I recall correctly and we do not want to let
7 those issues seep into this case. We think they're improper
8 and it is unduly prejudicial and misleading to have the expert
9 on the stand be asking those questions and suggesting that
10 there is, that it would be appropriate to assume a collapsing
11 of the entities. As Your Honor is aware, they have sued some
12 of individuals and entities previously and either recovered
13 from them or have dismissed them and made the election not to
14 pursue them. You have said there's no joint or several
15 liability in this case and we therefore, I guess --

16 MR. MANCHEL: I can't argue about whether it's being
17 brought in to show the expectations but I want to make it very
18 clear that we don't want to see pleadings conforming to the
19 evidence argument, that we're going on the record saying that
20 if, in fact, plaintiff is offering this for a piercing of the
21 veil or collapsing type of argument, we view it as being
22 inappropriate.

23 MR. GERMAN: Do I have to respond? I will. The
24 legal structure that Clipper created to do the private equity
25 was of their making. And it's their defense. It's nothing

1 we've done. It's their defense.

2 Our position is and has always been that these
3 Monitor companies operate as a single enterprise. They draw
4 pictures and their internal documents, the circle of friends I
5 call it, all the little Monitor companies around one of which
6 is Clipper, one of which is the Monitor Group, they call
7 themselves the Monitor companies. All of that evidence is in.
8 I suspect that we will ask questions of Ms. Evans, if she
9 testifies, or Dr. Blaydon about capitalization of these
10 companies, who they are, who their boards are. Fund II is a
11 group of investors. Sure, it is. It's a private equity fund.
12 But it's managed by a limited partnership. That limited
13 partnership is called Monitor Clipper Partner II LP. The
14 general partner of that limited partnership is called MCP2GP,
15 Inc. That's the general partner of the limited partner. That
16 is the general partner of the two limited partners. When you
17 get up to the top, that company that is the general partner of
18 the limited partnership that is the general partner of the two
19 Fund II entities, the board of directors of that corporate
20 general partner are -- they're the Clipper principals.

21 So we're not arguing to pierce the corporate veil per
22 se. I mean, we never argued that. But it's their position
23 that, first it was their position it was a matter of law the
24 Court had to respect that. The Court has held that that's an
25 argument for the jury. And we're going to argue to the jury

1 that it doesn't mean anything. Because we're not looking to
2 collect the judgment against Clipper by going to Fund II, at
3 least not now. But not in this case we're not. We're looking
4 to assess a royalty damages that Clipper would have agreed to
5 taking into account all of the benefits of all these entities.
6 That's what the Court has held. So we're not piercing the veil
7 per se. We're responding to a defense.

8 MS. GILMAN: I think this is a very fine line and
9 that's why we're trying to be careful about it. And as
10 Mr. Manchel said, we are mindful that there may be issues that
11 some of this evidence is relevant to other than piercing. When
12 they have the damages expert on the stand and they're asking
13 him questions that Your Honor has made it very clear that
14 damages in this case must be limited to this defendant and he's
15 talking about arguments to the jury about all of the entities,
16 that's what is causing us to stand up and talk about this
17 today. Because they tried to argue the joint and several
18 liability. They know these are not the same entities. They
19 tried to sue multiple of the entities. They cannot be treated
20 as the same. All of the entities are not here. Only Clipper
21 and Mr. Doctoroff are here as defendants. So any suggestion
22 that damages, I know he's saying they're not trying to collect
23 from the other entities, I think what they're trying to do is
24 collect from these defendants all of the damages that would
25 have been recoverable from the whole group of entities. And

1 that's not permissible.

2 So, again, we're raising the issue now because we do
3 have concerns about it and want the record to be clear.

4 MR. GERMAN: I would only say, Your Honor, that
5 Dr. Serwin was pounded for two and a half hours on these very
6 issues. You didn't consider this entity. You didn't consider
7 this entity. So I think the evidence that came out from the
8 expert was very fair redirect exam in response to two and a
9 half hours of cross. I'm not sure why we're arguing or making
10 a record at this point. I don't hear the defendants asking for
11 any relief. I assume this might be a preview of an argument
12 for tomorrow afternoon but if we're not, I mean, if there is a
13 point to this, I'd like to know what it is. I haven't heard it
14 yet.

15 THE COURT: Well, piercing the corporate veil has not
16 been pleaded to my knowledge unless you can direct me to it.
17 It is not in the case. It is not a basis for imposing
18 liability on anyone other than the two defendants that are in
19 the case. The defendants have said that there are these other
20 entities involved in the case and some of them are responsible,
21 that's a summation of the argument, but some of them are
22 responsible and we're not responsible or if we are, we're not
23 responsible for it all.

24 In response to that I think the jury is entitled to
25 see the big picture, the whole picture and know who owns those

1 companies and who directs and manages those companies. So I'm
2 going to allow that evidence in. I will not allow the
3 plaintiff to ask the jury to pierce the corporate veil or
4 impose liability on anyone other than the two defendants in
5 this case.

6 And with that, I will see you tomorrow morning.

7 Tomorrow, Charlie, take the white board down.

8 MR. GERMAN: Yes, sir.

9 MR. MANCHEL: Your Honor, for tomorrow at 4, were you
10 putting aside for us?

11 THE COURT: Yes.

12 MR. MANCHEL: Their case won't be done.

13 MR. GERMAN: No.

14 THE COURT: But I'll receive your motion and I'll
15 hear your arguments tomorrow and I'll rule it at the end of the
16 case.

17 MR. MANCHEL: Which motion?

18 THE COURT: I assume you're going to move for motion
19 for judgment as a matter of law. They may well ask me to take,
20 to declare these five compositions or five compilations trade
21 secrets. I'll take those things under advisement and announce
22 my ruling at the close of the plaintiff's case.

23 MR. MANCHEL: I'd prefer to wait. They have a very
24 important witness going on. Their general counsel is the last
25 witness on Tuesday.

1 THE COURT: You know what he's going to say?

2 MR. MANCHEL: No.

3 THE COURT: Should know what he's going to say.

4 MR. GERMAN: He's a 30(b)(6) witness. His testimony
5 was outlined in writing. That was marked as an exhibit and
6 there is a long deposition. That's what he is going to say.

7 THE COURT: I'd like to have your written materials
8 tomorrow and if you want to supplement those on Tuesday, you
9 may.

10 (Recess)

11 THE COURT: I'm told you want me back.

12 MR. MANCHEL: Your Honor, I'm sorry. I'm not sure
13 either personally or professionally I can physically do a
14 motion by tomorrow. I thought I would have until Tuesday.
15 I'll get it into you early. I'm having some personal issues.
16 I got Nick, who's been quarterbacking this, is moving today.
17 So I just don't think. I'll get it in before the last witness,
18 I'll even get it in on Monday if that helps the Court. But for
19 me to do this by 4:00 tomorrow, I don't think I can do justice
20 to my client. I'm sorry.

21 THE COURT: What if I asked you to have it in --

22 MR. MANCHEL: I can do it by first thing Monday
23 morning. I'll have it delivered wherever you want.

24 THE COURT: No. Just file it. I can access it. If
25 we have it by Monday morning.

1 MR. MANCHEL: Monday by 9, I'll have it. Thank you,
2 Your Honor.

3 MR. GERMAN: Same for plaintiff?

4 THE COURT: Yes.

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